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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED IN
THE COURT OF QUEEN'S BENCH,
AND
THE COURT OF EXCHEQUER CHAMBER
ON ERROR FROM THE COURT OF QUEEN'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES REPORTED AND CITED,
AND THE PRINCIPAL MATTERS.

BY
THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,
AND
FRANCIS ELLIS, OF THE INNER TEMPLE,
ESQES., BARRISTERS AT LAW.

VOL. III.
CONTAINING THE CASES OF TRINITY TERM AND VACATION AND
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HILARY TERM AND VACATION, 1861.
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JUDGES
OF
THE COURT OF QUEEN'S BENCH

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. Sir ALEXANDER JAMES EDMUND
COCKBURN, Bart., C. J.
Sir WILLIAM WIGHTMAN, Knt.
Sir CHARLES CROMPTON, Knt.
Sir HUGH HILL, Knt.
Sir COLIN BLACKBURN, Knt.

ATTORNEY GENERAL.

Sir RICHARD BETHELL, Knt.

SOLICITOR GENERAL.

Sir WILLIAM ATHERTON, Knt.

NOTICE.

In the completion of this Volume, which concludes "Ellis and Ellis's Reports," Mr. FRANCIS ELLIS has continued to have the valuable assistance of FREDERICK K. H. HASELFOOT, Esq., of the Inner Temple, Barrister-at-Law.

A

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ERRATA.

Vol. 2. Commencement. At end of list of Solicitors General add "Sir WILLIAM ATHERTON, Knt."

Vol. 2, page 324. Fifth line from top; and Vol. 3, page 146, last line but one. For "COMPANY" read "SOCIETY."

CASES

1860.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

TRINITY TERM,

XXIII. VICTORIA.

The Judges who usually sat in Banc in this Term
were:

COCKBURN C. J.		CROMPTON J.
WIGHTMAN J.		BLACKBURN J.

PATTEN, appellant, *against* RHYMER, respondent. *Saturday,*
May 26th.

CASE stated by two justices of *Essex*, under stat. 20 Stat. 9 G. 4.
& 21 Vict. c. 43. c. 61. s. 21.

This was an information under stat. 9 G. 4. c. 61. imposes
s. 21., against the appellant, who is an innkeeper at *Great* penalties upon
Baddow, in *Essex*, for knowingly suffering gaming in an innkeeper
for offences
against the
tenor of his
license. The
form of license
is given in

Schedule C. of the Act, and contains a proviso that the innkeeper shall "not knowingly
suffer any unlawful games or any gaming whatsoever" in the licensed house and
premises.

Held, that an innkeeper was liable to conviction, under sect. 21, for playing cards for
money with private friends of his own in his own private room in the inn.

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1860. his house and premises, by permitting several persons to

PATTON play at cards for money; contrary to the tenor of his
V. license. It was proved by the evidence of two police
RHYMER. officers that, about twelve o'clock on the night of 10th
January, 1860, they entered the inn kept by the
appellant, at *Great Baddow*, as a party then in the
house was in the act of breaking up and leaving; that
they found cards and also money upon a table in the
bar-parlour, where five persons had been assembled,
and four of whom were then in the room, the appellant
being one of them. The appellant admitted that they
had all been playing cards together, for money, at a very
low stake, and that the other four persons had come there
by his invitation. On behalf of the appellant it was satis-
factorily proved that the parties present were respectable
tradesmen of the parish, moving in the same sphere of
life as himself, and that they had come to his house,
upon the occasion in question, as his private friends and
by his special invitation; that they had all been in the
habit of visiting at each other's houses for the purpose of
playing a friendly game of cards, and it had arrived at
the appellant's turn to invite them to his house; and
that the room where they were assembled was a private
room of the appellant, and there were no other persons
in the house but the five persons before mentioned.

It was contended before the justices, on behalf of
the appellant, that the law was never intended to
deprive the innkeeper of his right to invite his private
friends to his house for the purpose and under the
circumstances proved.

The justices were of a contrary opinion, and held
that, under the words of the statute and the tenor of
his license, an innkeeper was not entitled knowingly

to permit cards to be played for money in any part of his licensed house and premises; and they therefore convicted the appellant in a mitigated penalty.

The question for the opinion of the Court was, whether, under the circumstances, the determination of the justices was right.

No counsel appeared in support of the conviction.

Barrow, for the appellant. The appellant has committed no offence against the tenor of his license. The form of the license is given in stat. 9 *G.* 4. c. 61. Schedule C., and contains a proviso that the person licensed shall not "knowingly suffer any unlawful games or any gaming whatsoever" in the licensed premises. The appellant has been convicted for knowingly suffering gaming in his premises. But, in the first place, all playing at cards is not gaming. Stat. 8 & 9 *Vict.* c. 109. s. 1. repeals so much of stat. 33 *Hen.* 8. c. 9. as declares any game of mere skill an unlawful game. Games at cards which require the exercise of skill, and are not mere games of chance, are, therefore, no longer unlawful: and, as the conviction does not specify the particular game which was played, the appellant is entitled to the benefit of the presumption that it was a game of skill. [*Crompton J.* How can any games at cards be games of mere skill? *Cockburn C. J.* All such games are more or less games of chance, though requiring skill also. *Wightman J.* In *Richardson's Dictionary* "to game" is defined, "to play for money."] Every game played for money is not unlawful. [*Blackburn J.* But is it not gaming?] Even assuming that it is, then, in the second place, it cannot have been in the contemplation of the Legislature to prevent an innkeeper from

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1860. inviting his private friends to a game of cards with him
 in a private part of the house. The acts which the
 statute forbids him to do or allow are acts done or allowed
 by him as an innkeeper, not as an individual. [*Cock-
 burn* C. J. There is this to be said in your favour,
 that it does not appear that the appellant intended any
 colourable evasion of the statute. Still, the Legislature
 may have intended to prohibit all card playing on the
 licensed premises. *Wightman* J. The difficulty of any
 other construction of the statute is that it would open a
 door to collusion.] The part of the premises where the
 appellant was entertaining his friends was his private
 dwelling-house, and not part of the inn.

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COCKBURN C. J. The words of the license are large
 enough to embrace the circumstances of the present
 case, and to justify the conviction. There is certainly
 a great difference between what is done by the landlord
 of an inn as landlord, and that which he does as a
 private individual. The Legislature may, however, have
 thought it necessary to prohibit any gaming, by any
 person, on any part of the licensed premises. Although
 I am not quite satisfied that such was their intention, I
 think that the safer course is to hold that it was; just
 as they appear, by the preceding proviso in the form
 of license, to have prohibited drunkenness or other dis-
 orderly conduct in any part of the premises (a).

WIGHTMAN J. I am of opinion that the conviction
 was right. I consider that the object of the Legislature

(a) The preceding proviso is, "that" the innkeeper "do not wilfully
 or knowingly permit drunkenness or other disorderly conduct in his
 house or premises."

was to impose, upon any person obtaining a license, the condition not knowingly to suffer any gaming on the licensed premises; whether the gaming be unlawful or what may be called innocent. The words "any gaming whatsoever" are wide enough to prohibit gaming of every description. Playing cards for money is gaming; granting that, under the circumstances of the present case, the gaming was innocent. Although nothing of the sort is here imputed to the appellant, it might be easy for a fraudulent person to evade the law, supposing it not to prohibit all playing at cards for money, by pretending that the gaming consisted merely of playing at a lawful game at cards with his private friends.

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CROMPTON J. The schedule to stat. 9 *G. 4. c. 61.* gives the form of license; which forbids not unlawful games only, but any gaming whatsoever. It was in the first place contended for the appellant that stat. 8 & 9 *Vict. c. 109. s. 1.* has rendered certain games, formerly prohibited, lawful; but that enactment cannot be called in aid to interpret the word "gaming" in this beer Act. As my brother *Wightman* has pointed out, playing for money is gaming. The only question therefore is, whether gaming by the landlord with his private friends in his private room is within the prohibition in the license. If the prohibition does not extend to such gaming, it must follow that the prohibition against allowing drunkenness on the premises will not prevent a landlord from allowing his private friends to get drunk there. I think that gaming by the landlord's private friends is both within the words of the Act and within the

1860. mischief sought to be prevented; and that the justices

PATTEN were right in convicting, however innocent the appel-
v. lant may have been of any wrong intention.
REYNER.

BLACKBURN J. I am of the same opinion. The tenor of the license is not confined to preventing persons who are the public guests of the innkeeper from gaming; but is intended to prohibit all gaming whatsoever, for fear lest unlawful gaming should be collusively carried on on any part of the licensed premises. I think therefore that the justices put a proper construction on the Act, in holding that the appellant had committed an offence against the tenor of his license.

Conviction affirmed.

*Tuesday,
May 29th.*

HARRISON *against* THE LONDON, BRIGHTON AND
SOUTH COAST RAILWAY COMPANY.

[Reported, in the Queen's Bench and in the Exchequer Chamber on error from that Court, 2 B. & S. 122.]

1860.

CHILCOTE, Appellant, *against* YOULDON,
Respondent.

Saturday,
May 26th,
Wednesday,
May 30th.

CASE stated by justices, under stat. 20 & 21 *Vict.*
c. 43.

At a Petty Sessions of the peace, held in and for the division of *Paington*, in the county of *Devon*, on 19th *January*, 1860, a complaint in writing was made, under the provisions of stats. 8 & 9 *Vict. c. 118.* and 15 & 16 *Vict. c. 79. s. 13.*, by the appellant, the valuer appointed and acting in the matter of the inclosure of the commons and waste lands of the manor of *Brizham*, in the county of *Devon*, against the respondent, an occupier holding over and detaining a portion of land used as garden ground, and alleged to be within the limits of the said common. On the part of the appellant, evidence was given of his appointment as valuer, and that the piece of ground occupied and held over by the respondent was originally an encroachment on the said common, and included in the map of the commons annexed to the provisional order for the said inclosure, under the seal of the Inclosure Commissioners. That no claim in

Stat. 15 & 16
Vict. c. 79.
s. 13. empowers the valuer acting in the matter of an inclosure to apply to justices to recover possession of any encroachment or inclosure which, under stat. 8 & 9 *Vict. c. 118.*, "shall be deemed to be parcel of the land subject to be inclosed," possession of which the actual occupier neglects or refuses to deliver up, after the determination of claims under that Act.

Held that, on the hearing of such an application by the valuer, the justices

have jurisdiction to inquire into the circumstances attending the encroachment or inclosure in question: notwithstanding that the occupier has made no claim before the valuer or the Inclosure Commissioners, and has not appealed against the award of the Commissioners, which includes the land in dispute. That, therefore, the justices were right in refusing to order possession to be given to the valuer of a piece of land proved to them to have been first inclosed more than twenty years before the first meeting of the Commissioners for the examination of claims; such land being, under stat. 8 & 9 *Vict. c. 118. s. 52.*, an ancient inclosure, and that section, taken with section 50, shewing that inclosures, only, of less than such twenty years standing are, under that Act, to be deemed to be parcel of the land subject to be inclosed,

1860. respect thereof, or in reference thereto, was made by the
CHILCOTE respondent before, or delivered to, the appellant as such
v. valuer, or otherwise, at the several times or places by
YOULDON. him appointed and notified for such purpose. That the
valuer had duly allowed the majority of the claims that
were so made by other parties, and that the land occupied
by the respondent was included and allowed in such
claims. And it was thereupon argued, on behalf of the
said appellant, that the land, so occupied and held over,
was an encroachment which, by being included in the
provisional order, must thereby be "deemed to be parcel
of the land subject to be inclosed," and therefore such
as he was empowered to recover under the provisions
of stat. 15 & 16 *Vict. c. 79. s. 13.* On the part of the
respondent, the above facts were not disputed; but it was
proved, in addition thereto, that the said piece of ground
had been inclosed for more than twenty years next
preceding the day of the first meeting for the examina-
tion of claims, but that the fences thereof were during
portions of such time in an imperfect condition; and
that it had been so occupied by different persons not
claiming directly from each other, or setting up any
special title thereto. And it was thereupon urged that
the said inclosure was an ancient inclosure under the
provisions of stat. 8 & 9 *Vict. c. 118. s. 52.*, and therefore
such as, by sect. 86 of the last named Act, the valuer was
not empowered to order to be inclosed without the
consent in writing of the person interested therein,
which said consent had not been given.

The justices thereupon considered that the fact so
proved before them, that the inclosure was an ancient one,
was a sufficient answer to the complaint, and that it was
not necessary that any claim thereto should have been

set up before the valuer, but might be pleaded, notwithstanding, as a justification for so holding over : and that the respondent could not be dispossessed of the said piece of ground without his consent in writing first had and obtained. And they dismissed the said complaint.

The appellant thereupon applied to them to state a case for the opinion of this Court thereon, on the grounds following.

First: That the acts of the valuer were conclusive, and could not be questioned before the justices.

Secondly: That the said encroachment, being included in the map annexed to the provisional order for inclosure by the Commissioners, was thereby conclusively "deemed to be parcel of the land subject to be inclosed" within the meaning of stat. 15 & 16 *Vict. c. 79. s. 13.*

Thirdly: That, such provisional order being conclusive as to what land should be "deemed to be subject to be inclosed," it was beyond the jurisdiction of the justices to hear any evidence as to the fact of its being an ancient inclosure, or any evidence in relation to such encroachment, other than was required to prove the allegations contained in the said complaint.

Fourthly: That, as the encroachment in question was included in the map annexed to the provisional order, the respondent was bound to have delivered a claim in writing to the valuer for any "right or interest he may have had or claimed in any land proposed to be inclosed," under sect. 17 of stat. 8 & 9 *Vict. c. 118.*, or to have appealed against the decision of the valuer (appellant), in respect of such claims as were delivered to, determined on, and allowed by, the valuer, under sect. 48 of the last named Act.

Fifthly: That, the fences of the said piece of land having been kept in an imperfect condition during the

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1860. twenty years next preceding the first examination of
 CHILCOTE claims, and the said piece of ground having been
 v. occupied, during such last mentioned term, by different
 YOULDON. persons, not claiming directly from each other, or setting
 up any special title thereto, the said piece of ground was
 not, therefore, an ancient inclosure, within the meaning
 of sects. 52 and 86 of stat. 8 & 9 *Vict. c. 118.*; but an
 "encroachment" within the meaning of sect. 50 of the
 said Act.

If the Court should be of opinion that the facts so
 proved before the justices were not sufficient to constitute
 the piece of ground so held over an "ancient inclosure"
 within the meaning of sect. 52 of stat. 8 & 9 *Vict. c. 118.*;
 or if they should think that, notwithstanding its being
 such ancient inclosure, the respondent was nevertheless
 estopped, for the reasons above assigned, from pleading
 the same in answer to the said complaint, then judgment
 was to be for the appellant.

J. D. Coleridge, for the appellant. First; the valuer's
 decision, while unappealed against, was conclusive, and
 could not be questioned before the justices, but only by
 appeal to the Inclosure Commissioners. Secondly, the
 land held over by the respondent, being included in the
 map annexed to the provisional order for inclosure by
 the Commissioners, must be conclusively "deemed to be
 parcel of the land subject to be inclosed" under stat.
 8 & 9 *Vict. c. 118.*, within the meaning of stat. 15 & 16
Vict. c. 79. s. 13 (a). Thirdly, the justices were wrong, in
 any event, in holding that the facts shewed that the land
 was an ancient inclosure within the meaning of stat.
 8 & 9 *Vict. c. 118. s. 52*. As to the first point, stat.

(a) See that section cited, post, page 12.

8 & 9 Vict. c. 118., by sects. 25—27, provides for the application, by persons proposing to inclose land subject to be inclosed, to the Inclosure Commissioners; the reference of the matters by them to an assistant Commissioner; and the subsequent embodiment by them of the conditions of the proposed inclosure in a provisional order. Sect. 33 enacts that a valuer shall be appointed; sect. 34 defines his powers and duties, and sect. 35 enables him to call in an assistant Commissioner as assessor, in matters of contested claims. [*Wightman J.* Do the claims there mentioned include a disputed question as to whether land is an ancient inclosure or not? Does not that section refer rather to claims as to land which it is admitted is subject to be inclosed?]

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Karslake, contra. The section is limited to contested claims to lands subject, under sect. 11, to be inclosed.

J. D. Coleridge. At all events the decision of the valuer on any claim is conclusive. By sect. 39 the Commissioners, or an assistant Commissioner, are empowered, on the representation of the valuer, to set out the boundaries of parishes or manors in which any land proposed to be inclosed is situate; subject to a right of appeal to this Court, or to an inquiry before a sheriff's jury. Sect. 44 regulates the proceedings upon the appeal. By sects. 46—49, the valuer is required to hold meetings and determine claims, in the matter of an inclosure. By sect. 50 all encroachments within twenty years "shall be deemed parcel of the land subject to be inclosed, and shall be" "inclosed accordingly," "and in case any dispute or difference shall arise touching any such encroachments" "or as to the extent thereof, such

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dispute or difference shall be determined by the valuer."

—
 s. Sect. 52 provides that inclosures of twenty years stand-
 α. ing shall be deemed ancient inclosures; but if a valuer
 has decided, under sect. 50, that an inclosure is not
 ancient, the only remedy of a party dissatisfied with his
 determination is by appeal against it, under sect. 55, to the
 Commissioners or an assistant Commissioner. The statute
 points out a regular course of proceeding, which, as
Kindersley V. C. decided in *Turner v. Blumire* (a), ought
 to be followed. Such also may be presumed to have
 been the opinion of the Lords Justices, who, in affirming
 that decision on appeal (b), expressed no dissent from the
 Vice Chancellor's ratio decidendi. Next, as to the second
 point: stat. 15 & 16 Vict. c. 79. s. 13. enacts that "when any
 person by whom any encroachment or inclosure, of what-
 ever value, which, under" stat. 8 & 9 Vict. c. 118., "shall
 be deemed to be parcel of the land subject to be inclosed,
 shall be actually occupied, shall neglect or refuse to quit
 and deliver up possession of the same, or any part
 thereof, to the valuer acting in the matter of the inclosure
 within one calendar month next after the determination
 of claims under" stat. 8 & 9 Vict. c. 118., "the posses-
 sion thereof may be recovered by such valuer under the
 provisions of" stat. 1 & 2 Vict. c. 74. Having regard
 to the enactments of stat. 8 & 9 Vict. c. 118., it is clear
 that land included in the map annexed to the provision
 of the Commissioners must, under that Act
 "be deemed to be parcel of the land subject to be inclosed"
 [Blackburn J. Does not sect. 13 of stat. 15 & 16
 c. 79. refer only to encroachments made within 1
 years; which, by stat. 8 & 9 Vict. c. 118. s. 50., "is

(a) 1 Dyer 402.

(b) 22 L. J. N. S. Ck. 7

deemed parcel of the land subject to be inclosed"? By sect. 49 of stat. 8 & 9 *Vict. c. 118.* the valuer is expressly disabled from determining title to land.] If the valuer has decided wrongly, his determination can be reversed on appeal. [*Blackburn J.* But must he not, in order to shew his right to the interference of the justices, prove before them that the land in question was subject to be inclosed, under sect. 50 of stat. 8 & 9 *Vict. c. 118.*? The proceedings before the justices are to be under the provisions of stat. 1 & 2 *Vict. c. 74.*; and under that Act a landlord seeking to recover possession of a small tenement must prove before the justices a tenancy and a holding over by the tenant, in order to give the justices jurisdiction.] Lastly, assuming that the valuer's determination was not conclusive, it was right upon the facts; and the justices were wrong in reversing it.

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Karslake, contra. The justices had jurisdiction to inquire into the matter, and they came to a right conclusion. Upon the finding, the piece of land in question must be considered to be de facto an ancient inclosure; and sect. 11 of stat. 8 & 9 *Vict. c. 118.*, which enumerates the descriptions of land subject to be inclosed under the Act, does not comprehend ancient inclosures. It cannot be said that all land included in the map annexed to the Commissioners' provisional order for inclosure is thereby to be conclusively deemed to be land subject to inclosure: otherwise, any part of the *New Forest* or of the *Forest of Dean* might become subject to inclosure if put into such a map; whereas sect. 13 of the Act excepts those forests from its operation. The facts in evidence before the justices shewed that the land in question in the present case was an ancient inclosure

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within sect. 52, having been inclosed for more than twenty years before the first meeting of the Commissioners. Sect. 50 shews that the only encroachments upon land which are subject to inclosure are encroachments made within twenty years of that meeting. By sect. 86 ancient inclosures cannot be inclosed without the written consent of the person interested in them. Sects. 47, 48, 55 and 56, which relate to claims before the valuer by persons setting up some right or interest in lands proposed to be inclosed; the determination of those claims by the valuer; and the appeal from him to the Commissioners, and from the Commissioners to the Assizes; apply only to claims relating to rights in lands which the Commissioners have power to inclose, and have no bearing on the claim of an owner of land to prevent its inclosure altogether. By stat. 15 & 16 *Vict. c. 79. s. 13.*, the valuer is empowered to recover possession of "any encroachment or inclosure" "which under" stat. 8 & 9 *Vict. c. 118.*, "shall be deemed to be parcel of the land subject to be inclosed:" by which must be meant, not all encroachments or inclosures that the Commissioners may choose to insert in their map, but such only as are subject to inclosure: such, that is, by reason of sects. 50 and 52 of the first Act, as are of less than twenty years' standing. *Turner v. Blamire* (a) was a motion for an injunction to restrain the Commissioners from confirming the award of their valuer; and the injunction was refused, on the ground that it appeared that the plaintiff had acquiesced in the result of the preliminary inquiry by an assistant Commissioner, namely, that the land in dispute was subject to inclosure. But the fact, proved by the present respondent, that his land is an ancient

(a) 1 *Drew*, 402.

inclosure, shews that the valuer had no jurisdiction whatever to inclose it.

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Coleridge, in reply. Stat. 15 & 16 *Vict. c. 79. s. 13.* authorizes the valuer to recover land which, under stat. 8 & 9 *Vict. c. 118.*, "shall be deemed to be parcel of the land subject to be inclosed." The question is, by whom must it be so deemed? Surely, by the Commissioners. Assuming, therefore, that the Commissioners, by reason of sects. 50 and 52 of the earlier Act, are wrong in deeming an encroachment of more than twenty years' standing subject to inclosure, still, if they so deem it, their decision is conclusive and cannot be inquired into by the justices. By sect. 55 of the first Act, the valuer is to make out a schedule of the claims which he allows, "after" he "shall have heard and determined all claims and objections which shall have been made in the matter of an inclosure". The proper course, therefore, for an owner of land, who denies that it is subject to inclosure, to adopt, is to go before the valuer and make out the exemption. It is too late to take such an objection after the valuer has heard and determined. [*Cockburn C. J.* Can the valuer give himself jurisdiction in such a case, by deciding the matter of fact, as to the liability of the land to inclosure, wrongly?] If he has jurisdiction to inquire, he has, also, jurisdiction to determine; and if his determination is wrong the only redress is by an appeal under the statute. The defendant could not, by setting up a question of title, oust the jurisdiction of the justices to give the valuer possession of the land which the defendant was proved to be holding over; *Rees v. Davies (a)*.

(a) 4 *C. B. N. S.* 56.

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COCKBURN C. J. I am of opinion that our judgment should be for the respondent. The question is, whether a person who has obtained a piece of land by encroachment upon land subject to be inclosed, has a right to the possession and also to the property of and in that piece of land, when an inclosure takes place; or whether, if he makes no appeal against the decision of the Commissioners inclosing his land, he is bound by their award although the land was not subject to be dealt with by them at all. It appears to be admitted by the appellant that there is no distinction in principle between this case and that of the inclosure of ordinary freehold land acquired by a more legitimate title than encroachment. Now, having regard to stat. 8 & 9 *Vict. c. 118.*, I think that all its provisions relating to the inclosure of land refer to land which is not only proposed to be but is also subject to be inclosed. It is, in fact, clear that the Legislature could not have contemplated an interference with land the private property of individuals; whether that property be acquired by long encroachment or otherwise. The Act, by sect. 11, sets out the descriptions of land which are to be subject to inclosure. Then follows a scheme for effecting the inclosure. Parties interested in land subject to be inclosed, and desirous of its inclosure, are to apply to the Commissioners, who are then to refer the application to an assistant Commissioner; that he may inquire into the expediency of the proposed inclosure, and hear and consider what has to be said for, and what objections can be urged against it. I think that the "objections" "to the proposed inclosure" mentioned in sect. 25, do not include an objection that the land is not land subject to inclosure; but are restricted to objections against the general expe-

diency of the inclosure. After the assistant Commissioner has reported, a valuer is to be appointed, to hear and determine the claims of persons claiming any common or other right or interest in any land proposed to be inclosed; and, by sect. 48, his order as to "any doubts or difficulties" "respecting such claims, or any differences" "between any of the claimants touching their respective claims, or the relative proportions of their rights and interests," is to be final unless a party dissatisfied with it appeals to the Commissioners. Then follows, in sect. 50, an important enactment that "encroachments and inclosures" "which shall have been made by any person, from or upon any part of the land proposed to be inclosed, within twenty years next before the first meeting for the examination of claims in the matter of the inclosure," "shall be deemed parcel of the land subject to be inclosed." And, by sect. 52, encroachments of twenty years' standing are to be deemed ancient inclosures for the purposes of the Act. Sect. 56 is very material. It gives a right of appeal to "any person claiming to be interested in any land proposed to be inclosed," from "any determination of the Commissioners or assistant Commissioner concerning any claim or interest in or to the land proposed to be inclosed under the powers" of the Act. To me, this section appears to be merely the sequel to sect. 48, which gives an appeal from the valuer to the Commissioners. Sect. 56 gives the like appeal from the determination of the Commissioners; an appeal, as it seems to me, founded upon the same grounds as that under sect. 48. I do not see how it can apply to an objection, such as the present, that the land is not subject to inclosure at all; raised by a person who has

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never made any claim or objection at all before the valuer, and has never appealed from him to the Commissioners. There is no provision in the Act giving such a person any appeal at all. The whole scope of the Act is to confer powers for inclosing land subject to be inclosed; and nothing short of a very express enactment would justify us in holding that it gives the Commissioners jurisdiction to decide questions of title, and of the private right to their property of the owners of land not so subject. The Legislature has not empowered the Commissioners to finally decide whether an encroachment is of twenty years' standing or of less. If it is of twenty years' standing, the Commissioners cannot bind the person whose land it is, by finding, contrary to the fact, that it is of less.

WIGHTMAN J. This question arises on a proceeding under stat. 15 & 16 *Vict. c. 79. s. 13.*, by which the appellant, the valuer, sought before justices to recover possession of an encroachment upon land subject to be inclosed, and which was occupied and held over by the respondent, in the same manner as is provided by stat. 1 & 2 *Vict. c. 74.* for the recovery of the possession of small tenements from tenants. The valuer contended that the encroachment in question was to "be deemed to be parcel of the land subject to be inclosed" under stat. 8 & 9 *Vict. c. 118.*: and the justices entered into the preliminary inquiry whether it was properly so deemed: whether, that is, it in fact was parcel of such land. I think that the justices had full right to institute that inquiry. It is said, by the appellant, that the question of parcel or no parcel had been conclusively determined already, by the insertion of the encroachment in the

map of the inclosure, as parcel of the land to be inclosed; no objection to or appeal against such insertion having been made by the respondent at any time before the map appeared. This brings us to consider the provisions of stat. 8 & 9 *Vict. c. 118*. In so doing, we must take the fact to be found that this encroachment was of more than twenty years' standing before the Commissioners' first meeting; and that it therefore is, by reason of sect. 52, to be deemed and taken to be an ancient inclosure. [His Lordship read the section.] From that section it would seem that the encroachment was not land subject to be inclosed. Sect. 47, which relates to claims to be sent in to the valuer, applies only to claims of right in alieno solo. Mr. *Coleridge* appears to admit that; but to contend that the respondent ought to have taken his objection before the valuer, obtained his determination upon it, and had the matter reheard by the Commissioners or an assistant Commissioner, under sect. 55. Sect. 49, however, provides that nothing in the Act "shall extend to enable the valuer, or the Commissioners, or any assistant Commissioner, to determine the title of any lands, or to determine any right between any parties contrary to the actual possession of any such party (except in cases of encroachment as hereinafter mentioned)." In the course of the argument I was struck with the necessity of ascertaining to what the exception there mentioned applies; and I think that it applies to cases of encroachment the title to which depends upon lapse of time; and that it is confined to encroachments falling under sect. 50, as being of less than twenty years' standing, and not to those falling under sect. 52. No doubt the valuer may deal with any part of an encroachment which is proved

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to have been made within twenty years, though the rest of it is within the protection of sect. 52. But no such question arises in the present case. The entire encroachment having been made more than twenty years ago, it is an ancient inclosure, and the valuer had no power to inclose it either in whole or in part.

(CROMPTON J. was absent.)

BLACKBURN J. I am of the same opinion. Stat. & 9 Vict. c. 118., by sect. 11, defines what are lands subject to be inclosed, and it thence appears that there are lands subject to rights of common. Sect. 25 provides for an application to the Commissioners, with view to an inclosure, by persons interested in such land. It may often happen, as it did in *Turner v. Blami*, that a dispute arises whether part of the land proposed to be inclosed is subject to inclosure or not. An objection far from saying that it might not have been expected to give the Commissioners power to decide what lands are and what were not, so subject; and to make the inclosure, subject to an appeal, final. But I fail to find any provision to that effect in the Act. The "objection" to the inclosure, into which the assistant Commissioner by sect. 25, to inquire, do not appear to me to be a dispute as to whether the land proposed to be inclosed is subject to inclosure or not. Sect. 49 provides that the valuer and Commissioners from determining the title to land, "except in cases of encroachment hereinafter mentioned;" except, that is, encroachment for less than twenty years,

(a) 1 Dyer. 42. Judgment affirmed on appeal.
22 L. J. N. S. (N. 788)

the operation of sect. 50. There is nothing to shew that the Commissioners may conclusively give themselves jurisdiction by finding, contrary to the fact, that an encroachment is of less than twenty years' standing. That being so, I think that the justices have power, at the hearing of an application to them by the valuer, under stat. 15 & 16 *Vict. c. 79. s. 13.*, to determine the fact which settles whether or not the encroachment, possession of which he seeks to recover, is to be deemed to be parcel of the land subject to be inclosed; the fact, namely, whether or not the encroachment took place within the last twenty years. Then arises the question whether they were precluded from determining in favour of the respondent by the circumstance that the encroachment in dispute was inserted in the Commissioners' map of the lands to be inclosed. But, as I have already said, however desirable it might have been to make the Commissioners' decision conclusive, I find no power given to them by the Act finally to determine such a matter; and such a power could only be given them by express enactment.

Judgment for the respondent.

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Friday,
June 1st.SMITH *against* MUNDY.

The property in the halves of bank notes, sent in payment of a debt due to the receiver from a third person, with an intention on the part of both sender and receiver that the other halves are to follow, remains in the sender until he sends the second halves; the payment being, until then, inchoate and conditional. It is therefore open to the sender, at any time before sending the second halves, to disaffirm the transaction and redemand the first halves from the receiver; who is liable to an action for refusing to return them.

SPECIAL case stated, after writ issued and without pleadings, by consent and by order of *Blackburn J.*

The action was brought by the plaintiff against the defendant for the non-return by the defendant to the plaintiff of the half parts of two Bank of *England* notes of the plaintiff, one for 20*l.*, and the other for 10*l.*, which had been sent by the plaintiff to and received by the defendant, and which the plaintiff alleged the defendant was bound to redeliver to the plaintiff on request, which was made; and also for the wrongful conversion by the defendant of the plaintiff's said half parts of the said two Bank of *England* notes; and also for the detention from the plaintiff of his said half parts of the said two notes.

On 12th *August*, 1859, the plaintiff entered into an agreement with one *George Williams*, of *Esperanza, Torquay*, in the county of *Devon*, for entering into a partnership with the said *G. Williams*, in regard to certain furnished houses at *Torquay*, of which the said *G. Williams* was possessed. The following is a copy of the agreement,

“*Esperanza, Torquay, South Devon.*

“Memorandum of agreement made this 12th day of *August*, 1859, between *George Williams*, of *Esperanza, Torquay, South Devon*, on the one part, and *George Smith*, of 124, *Great Dover Road, London*, on the other part; that is to say, that the house *Esperanza* is under lease to the above named *George Williams* for a term of

7, 14, and 21 years, at a rental of 91*l.* per annum; so likewise is the house *Albyn Lodge*, at a rental of 90*l.* per annum; so likewise is the house called *Cambourne*, at the rental of 130*l.* yearly. The said *George Williams* assures *George Smith* that his liabilities for furnishing the said houses do not exceed 700*l.*, their original cost being 1000*l.*; that the said *George Williams* agrees to accept of the said *George Smith* as a partner, to share equally the profits and liabilities in connection with the said houses, on condition of his paying into a bank, at *Torquay* or elsewhere, to the joint credit of the above named partners, the sum of 500*l.* This paper to be binding on each until a deed of partnership is executed.

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“*George Williams.*”

“*George Smith.*”

“Witness, *Alice Williams.*”

The sum of 500*l.* has never been paid by the said *George Smith* into any bank, at *Torquay* or elsewhere, to the joint credit or otherwise. At the time of the making of the said agreement *Williams* represented to the plaintiff that he was under certain liabilities, and owed certain debts in respect to the furnishing of the said houses; and that, amongst others, he owed the defendant, who was a china and glass merchant at *Bristol*, 35*l.* for china and glass which had been supplied by the defendant to *Williams* for furnishing the said houses. On 17th *August*, 1859, the plaintiff wrote, addressed and sent by post to the defendant a letter of which the following is a copy.

“124, *Great Dover Road.*”

“S.E. *London*, Aug. 17, 1859.

“Mr. *Thos. G. Mundy.*”

“Sir. I presume Mr. *George Williams*, of *Esperanza*,

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Torquay, has informed you of my having joined him in his line of business, and that the debts contracted after this date will be in the joint names of *Williams* and *Smith*. I enclose you half-notes for 35*l.*, and in acknowledging the same please forward me a statement of the full amount due to you by Mr. *Williams*, and oblige

“Your obedient Servant,

“*George Smith*.”

“P.S.—I find I have not a 5*l.* note, but will enclose it in next.

“No. 80,730, *March* 20, 1859 . . . £20

“No. 85,543, *June* 20, 1859 . . . 10

£30.”

The half notes for 30*l.*, referred to in the above letter, were the halves of two Bank of *England* notes, and the same were inclosed in the said letter and sent therein by post to the defendant. The numbers and description of the halves of the said two notes so enclosed and sent in the said letter to the defendant were and are as follows. No. 80,730, dated 20th *March*, 1859, for 20*l.*; also, No. 85,543, dated 20th *June*, 1859, for 10*l.*

The above mentioned letter, and the said halves of the said two Bank of *England* notes inclosed therein, were duly received by the defendant. They were sent to the defendant with the sanction and authority of the said *George Williams*. The said notes were the notes of the plaintiff at the time of the sending the same; and at that time, and at the time of the receipt by the defendant of the halves of the said two notes, the plaintiff was under no other contract or liability than that, if any, shewn by the said agreement, together with the facts above stated, to send the same; nor was the plaintiff under any obli-

gation, except as aforesaid, to pay the defendant the said debt so due to him from the said *G. Williams*, or any part thereof. On 18th *August*, 1859, the defendant, on receipt of the said letter, wrote and, paying the postage, sent by post to the plaintiff, who in due course received from him, a letter of which the following is a copy.

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" *August* 18th, 1859.

" Sir. I am in receipt of your favour enclosing the first half of a twenty and a ten pound note, and on receipt of the second halves will send a stamped acknowledgment. According to your request, I herewith enclose a statement of account due from Mr. *Williams* for goods sent: also the amount, as near as I can at present give, of the goods which are selected to be sent for the new house.

" I am, Sir, yours, &c.,

" *Thos. G. Mundy.*

" Amount of account against Mr. *Williams* £29. 8s. 3d.

" The amount of goods selected for the new house amounts to from 55*l.* to 60*l.*"

None of such goods mentioned in such letter, excepting the 29*l.* 8s. 3d., which had been supplied previously to the said agreement, were supplied to the said *George Williams* or to the plaintiff.

On 19th *August*, 1859, the plaintiff wrote, addressed and sent by post to the defendant, who duly received, a letter of which the following is a copy.

" Mr. *T. G. Mundy*,

" 124, *Great Dover Road*, S.E., *London*, Aug. 18, 1859.

" Sir,—I beg to request that no goods be debited to me, or use made of half notes I sent to you, until you again hear from me.

" Your obedient Servant,

" *George Smith.*"

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Torquay. The half notes referred to in the last letter were the
his li: ~~halves of the said two Bank of England notes sent by the~~
this ~~plaintiff to and received by the defendant as hereinbefore~~
Smith ~~mentioned.~~
know: ~~mentioned.~~
the On 22nd August, 1859, the plaintiff wrote, addressed

and sent by post to the defendant, who duly received the
same, a letter, of which the following is a copy.

"Mr. T. G. Mundy.

"London, August 22, 1859.

i: "Sir. In consequence of having withdrawn from any
partnership with Mr. Williams, of *Torquay*, I request
the return of the half notes I sent to you on the 17th
instant, for 30*l*.

"And oblige, Yours, &c.,

"No. 80,730 . £20

"George Smith.

85,543 . £10

£30."

At this time the defendant had no knowledge that the
said agreement of 12th August, 1859, subsisted between
the plaintiff and the said *George Williams*. The half
notes referred to in the last letter were the halves of the
said two Bank of *England* notes sent by the plaintiff to
and received by the defendant as hereinbefore mentioned.

On 21st December, 1859, one *Henry Gribble*, being
the plaintiff's agent and duly authorized by the plaintiff
so to do, verbally demanded of the defendant, and re-
quired the defendant to deliver to him, for the plaintiff,
the said halves of the said two Bank of *England* notes.
The defendant on that occasion refused, and has ever
since refused, to deliver the said halves of the said two
notes either to the plaintiff or to his said agent, and the
defendant claims a right to retain the same.

The said *Henry Gribble*, at the time he made the

aforesaid demand, also served the defendant with a written demand, duly signed by the plaintiff. The defendant has refused to comply with such written notice and demand, and still retains and claims a right to retain the said halves of the said two notes.

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The question for the opinion of the Court was, Whether the plaintiff was entitled to recover from the defendant the said halves of the said two Bank of *England* notes, or their value.

Macnamara, for the plaintiff. The plaintiff is entitled to recover. The case is one of the first impression: but, on principle, the plaintiff's right is clear. Nothing has taken place between him and the defendant which can operate to divest the plaintiff of the property in the half notes sent to the defendant. The sending them was not payment of the debt due from *Williams*, but only a step towards payment. It was an inchoate and incomplete act. The defendant himself treats it as such, in his letter of 18th *August*, 1859, by which, after acknowledging the receipt of the half notes, he states that he will send a stamped acknowledgment on receipt of the second halves. *Williams*, if sued by the defendant for the original debt, could not have made out a plea of payment by proof that the half notes had been sent by the present plaintiff to the defendant on account of it; nor could the defendant sue the plaintiff for not sending the second halves. Again, it is clear that there was no gift of the half notes by the plaintiff to the defendant; nor was there any contract between them, or any consideration for the passing of the property in the half notes to the defendant. The transaction amounted to no more than a conditional delivery of the first halves;

1860. it is as though the plaintiff had said to the defendant,
SMITH "I intend these halves to be yours, when and provided
V. that I send you the others, and you accept them in
MUNDY. payment." There is no such thing in law as a qualified
or partial passing of the property in a thing: it must
either pass altogether or not at all. Tried by this test,
the property in the half notes sent remained in the
plaintiff. If the whole debt due to the defendant had
been afterwards paid in cash, the plaintiff could, clearly,
have recovered back the half notes. *Hough v. May* (a)
decides that there cannot be a conditional payment.
The defendant in that case relied, in support of a plea
of payment to, and acceptance of the sum paid in satis-
faction by, the plaintiffs, on a cheque which he had sent
to them, which, in the body of it, was stated to be for
"balance account;" but the Court held that, to make
the delivery of the cheque a payment, it should at least
be unconditional. *Littledale J.*, in giving judgment,
said, "The case would be different, if the plaintiffs had
received the cheque as money; but all that appears is,
that it was sent to them by the defendant. They say,
'we never authorized the sending of this cheque to us,
and we shall commence an action.' Perhaps a party
ought, under such circumstances, to send the cheque
back: but here the plaintiffs offer to do so; and they
were not bound to suspend the commencement of the
action till they had returned the cheque. Again, I rather
think that the condition inserted in the cheque might
be evidence against the plaintiffs, if they presented it."
These dicta tend to shew that, in the present case, the
property in the notes would not have passed to the

(a) 4 A. & E. 954.

defendant till he had accepted them as payment, even had the plaintiff sent the whole notes to him. If one party to a pending contract sends the other, in the course of the negotiation, a document intended as a means of carrying out the contract, the right to the document reverts to the sender if the contract goes off. *Roberts v. Wyatt* (a) so decides; it being there held that, upon a contract for the sale of an estate, the title and abstract to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract until either the purchase is finally rescinded by consent, or declared impracticable by a Court of equity; but that, when the contract is determined, the abstract becomes the property of the vendor. In that case the contract was still open, and therefore the plaintiff, the purchaser, was held entitled to recover, in trover, the abstract originally sent to him by the defendant, the vendor's solicitor, returned, with numerous queries, by the plaintiff to the defendant, and which the defendant refused to redeliver, on the ground that he could not clear up the plaintiff's objections. Sir *James Mansfield* C. J., however, in giving judgment, said, "It is clear that the plaintiff had, not a special, but a temporary property in the abstract, that is, till the contract is disposed of; and then, I think, it reverts to the vendor." So, in the present case, as soon as his contract with *Williams* was at an end, the plaintiff became absolutely entitled to the half notes in the defendant's possession. To the same effect is *Esdale v. Oxenham* (b); where the plaintiff, an intending purchaser of an estate, was held entitled, after abandoning the contract of purchase, to recover in trover from the

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(a) 2 Taunt. 268. 275.

(b) 3 B. & C. 225.

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defendant, an attorney, the deeds of conveyance of the estate, which had been prepared at the plaintiff's expense, sent by him to and executed by the vendor, refused execution by other necessary parties, and had come into the possession of the defendant, who refused to deliver them up, claiming to have a lien upon them for professional business done for the vendor.

J. D. Coleridge, for the defendant. The defendant is entitled to keep the half-notes. First, upon the facts as stated in the case, there was a good and binding contract between the parties, which has been in part performed. Secondly, the plaintiff, when he sent the half notes, intended to part with the property in them, and the defendant accepted them unconditionally. Thirdly, the transaction was in effect a payment by *Williams*, through the plaintiff as his agent, of the debt due from *Williams* to the defendant. The plaintiff sent the half notes, with that object, and with the sanction of *Williams*, at a time when there was a subsisting agreement for a partnership between him and *Williams*. The first halves were sent in payment; and no other condition was attached to the payment than that the defendant should accept the other halves in completion of it. [*Wightman J.* Can the defendant sue *Williams* on the ground that the second halves were not sent?] *Williams* would probably be liable to the defendant, on that ground, in some form of action. But that is not a proper test of the defendant's right to retain the first halves, as against the plaintiff. The defendant is entitled to do so, having accepted them unconditionally. The fact, relied on by the other side, that the defendant, in his letter of 18th August, 1859, promises to send a stamped receipt in acknowledgment

of the second halves, when he gets them, does not shew that he had not finally accepted the first halves. [*Cockburn* C. J. Suppose that the plaintiff, after sending the first halves, had lost the others, could he not have told the defendant of the loss, and offered him thirty sovereigns instead of the remaining half notes? And could the defendant then have refused such an offer, and sued the plaintiff for not delivering the other halves? *Blackburn* J. Can you suppose that the parties intended or contemplated that the defendant should possibly become the owner of worthless half notes?] The Bank of *England*, if satisfied of the loss of the remaining halves, would pay the notes. Suppose, on the other hand, that, instead of half notes, the plaintiff had sent the defendant half of a five sovereign piece: surely the defendant would have been entitled to retain that piece. The intention of the parties can hardly be an element in the discussion; events having happened which were not in their contemplation. The question is, what is the effect, in law, of what has been done? [*Blackburn* J. Then you must contend that there is something in law by which the property would pass, irrespective of the intention.] If anything turns upon the intention, it is evident that the plaintiff, when he sent the first halves, never thought of having them back. [*Wightman* J. He never intended that those halves, alone, should be kept by the defendant.] The act of sending them almost amounted to a gift.

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Macnamara was not called upon to reply.

COCKBURN C. J. I think that our judgment must be for the plaintiff. The case is novel and somewhat

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curious; but when the question is closely looked into all difficulties disappear. It seems that the plaintiff, having entered into a contract for a partnership with *Williams*, agreed with him to discharge the debt which he owed to the defendant; and the plaintiff accordingly sent the two half Bank notes to the defendant. The arrangement with *Williams* for the partnership having gone off, the plaintiff declines to send the remaining halves, and calls on the defendant to return those already sent. The defendant refuses, on the ground that the plaintiff has parted with the property in those halves; and the question is, whether the plaintiff has in fact done so. This depends upon what was the intention of the parties, respectively, in sending and in receiving the half notes. Now I think that the intention of the plaintiff was to liquidate *Williams's* debt to the defendant, and that he parted with the half notes only in a manner co-extensive with that purpose. By sending the half notes he did not extinguish *Williams's* liability. The case would have presented a different aspect had the defendant, on receiving the half notes, agreed to exonerate *Williams* altogether, and to look only to the plaintiff. But in the actual state of facts there is nothing to prevent the defendant from proceeding against *Williams*, and treating the defendant's acceptance of the half notes as a mere inchoate and conditional payment, to be completed only on the arrival of the other halves. Indeed, he guards himself against being supposed to treat the first halves as payment, by writing to the plaintiff and promising to send a stamped acknowledgment on receiving the second halves. Nor can the plaintiff have intended that *Williams* should be relieved from liability to the defendant till the second halves had been sent. It appears to me, therefore,

that the transfer of the first halves to the defendant was intended by both parties to be inchoate, not complete ; and not so to vest the property in them in the defendant, that he could, under any circumstances, insist upon keeping them and refuse to redeliver them to the plaintiff.

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WIGHTMAN J. I am of opinion that no absolute property in the half notes passed to the defendant. Neither the plaintiff or the defendant intended that they should be treated as payment, or half-payment, of *Williams's* debt. As long as it remained doubtful whether the defendant would receive the remaining halves, the defendant might have brought an action against *Williams* for the debt, in which a plea of payment could not have been supported. It seems to me, therefore, that the absolute right to the first halves never passed from the plaintiff to the defendant.

(CROMPTON J. was absent.)

BLACKBURN J. I am of the same opinion. Till the payment should be complete, the half notes sent to the defendant remained the property of the plaintiff. It clearly was not the intention of either party that each of them should have the property in the halves in his possession. The circumstance that the notes were cut into halves may be regarded as a mere accident. Suppose that the plaintiff had held out a whole note to the defendant, and that the defendant had taken hold of it, the property in it would not have passed to the defendant until the plaintiff had entirely relinquished his hold. So long as the plaintiff retained a partial control

1860. over the note, he would have been at liberty to change
 SMITH his mind and refuse to hand it completely over to the
 v. defendant. So, in the present case, there could be no
 MUNDY. change in the property in the notes till both halves had
 come into the defendant's possession.

Judgment for the plaintiff.

Thursday
 June 26th.

In the matter of FRANCIS BLAKE, Gentleman,
 one &c.

The summary jurisdiction of the Court over its attorneys is not limited to cases in which they have been guilty of misconduct such as amounts to an indictable offence, or arises in the ordinary course of their professional practice; but extends to all cases of gross misconduct, on their part, in any matter in which they

GARTH had obtained a rule on behalf of *The Incorporated Law Society*, calling upon *Francis Blake*, an attorney of this Court, to shew cause why he should not be struck off the roll of attorneys of this Court, or why he should not answer the matters charged in the affidavits.

The matter was referred to the Master, to examine into and report on the charges alleged against *Blake*. The Master reported that the charges resolved themselves into three cases, in two of which the motion was not pressed, and they are therefore here omitted. In the third, which may be called *Beevirs's* case, as to which the Court was prayed to make the rule absolute, the Master's report was as follows:—

may, from its nature, fairly be presumed to have been employed in consequence of their professional character.

B. lent money to an attorney, whom he had previously known and employed as such, on the security of the attorney's promissory note for the amount, and of the deposit by the attorney of a deed of assignment to him of a mortgage on an estate in *Ireland*, by which a greater amount than *B.'s* loan was secured to the attorney. The estate getting into the *Irish* Encumbered Estates Court, the attorney borrowed the deed of *B.* for the purpose, as he alleged to *B.*, of supporting his claim in that Court, but in reality in order to obtain from that Court payment of the amount secured to him by the deed. Having, by production of the deed to the Court, established his right to that payment, he returned the deed to *B.*, and afterwards received out of Court the whole of the amount which he claimed. He never informed *B.* of this, but appropriated the whole amount to his own purposes, and continued for several years afterwards to pay *B.* interest on his loan. He then became insolvent, and *B.* in consequence lost the whole of the money advanced by him.

Upon these facts the Court, holding that the attorney had been guilty of gross misconduct, suspended him from practising for two years.

"In this case the acquaintance between the parties commenced as long back as 1830, *Beevirs's* brother having been at first servant and afterwards farm-bailiff to *Blake*, on his property at *Richmansworth*. In *April*, 1846, *Beevirs*, while on a visit to his brother at *Richmansworth*, mentioned to *Blake* that he had some spare money at his disposal. In consequence of what then passed, he called at *Blake's* office on 7th *April*, and handed to him 1000*l.*, and received as security *Blake's* promissory note for 1000*l.*, and, as an equitable deposit, a deed of assignment to *Blake* by *George Gordon Smith*, of a share, amounting to 8125*l.*, of a large mortgage on estates in *Ireland*, as a security to *Blake* for a sum not exceeding 2000*l.* It is not clear whether the deed was deposited with *Beevirs* as security for the whole 1000*l.*, or only for 700*l.*; probably the latter sum. *Beevirs* states that, up to this time, *Blake* had acted as his solicitor, and that he had no other legal adviser; but admits that, about a week after the loan, he consulted *Mr. Fitch*, a solicitor, who told him the security was good. *Blake* admits he was so employed by *Beevirs* as his solicitor, but that he was so employed only on two or three occasions during the whole of the acquaintance, and this is not contradicted. On 15th *December*, 1847, *Blake* wrote to *Beevirs* as follows:—

"Dear Sir. I have received a letter from *Dublin* to-day, requesting me to send over for a few days my mortgage deed in your possession, for production before the Master in Chancery there, in support of my claim; and I shall feel much obliged if you will let me have it for a few days, giving you my undertaking to return it.
Yours truly,

"*Francis Blake.*"

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The deed was accordingly lent, and returned in a few days. Subsequently, *Blake* applied for the loan of the deed a second time, and it was again lent and returned. By the production of the deed on one or other of these occasions, before the Master in Chancery in *Ireland*, he was enabled to make his report; and the necessity of again producing it to obtain the money was dispensed with. In *December*, 1850, *Blake* applied to *Beevirs* again for the deed, in order that *Blake* might raise more money upon it. *Beevirs*, it appears, at first assented, but afterwards refused, on the ground that he might himself want to raise money upon it. In *August*, 1852, the money being receivable from the Encumbered Estates Court in *Ireland*, *Blake* went to *Dublin* and received the money due to him upon the security, namely, 1626*l.* 11*s.* 7*d.* He wholly omitted to communicate the fact to *Beevirs*, and continued to pay interest on the 1000*l.* down to *April*, 1855.

The only extenuating circumstances that are suggested on the part of *Blake* in this case are, that he had a lien upon the mortgaged estates, beyond the 1626*l.* 11*s.* 7*d.*, for a sum of 3000*l.* or 4000*l.* for costs, which (though he afterwards lost his lien) would have enabled him to satisfy *Beevirs*'s claim; that *Beevirs* gave no notice of his claim to the Court of Chancery or the Encumbered Estates Court; from which he wishes it to be inferred that *Beevirs* relied chiefly, if not entirely, on his (*Blake*'s) personal security; and that, down to *May*, 1856, *Blake* could at any time, at a week or ten days' notice, have repaid *Beevirs* the 1000*l.*, if he had pressed for it. *Blake* also states that when, subsequently, in *May*, 1856, he found his affairs embarrassed, he prepared and engrossed

a mortgage to *Beevirs* for the amount of his debt, on property (the *Matlock Bath Estate*) which he then thought was of ample value. *Beevirs's* assent was never obtained to this mortgage; in fact, he never knew anything of it; and it was not executed, in consequence, as *Blake* states, of his being obliged by the pressure of his affairs to leave *London* suddenly. But the fact remains totally unanswered, that *Blake* did, in *August*, 1852, receive from the Encumbered Estates Court 1626*L*. 11*s*. 7*d*. (*Beevirs's* lien for 1000*L*., or at least 700*L*., being still unsatisfied), entirely without the knowledge, and retained it without the assent, of *Beevirs*; and that, in consequence, upon *Blake's* insolvency in 1856, *Beevirs* lost the whole amount of his debt."

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It further appeared from the Master's report that *Blake*, having become insolvent in 1856, filed a petition in the Insolvent Court on 28th *February*, 1859, and was afterwards remanded by the Court for two years, on the ground of this and other fraudulent debts.

Dowdeswell now shewed cause, and cited *Stephens v. Hill (a)*.

Garth was heard in support of the rule, and cited *In re King (b)*.

The nature of the arguments sufficiently appears from the judgments of the Court.

COCKBURN C. J. I am of opinion that *Blake* is amenable to the summary jurisdiction of this Court, although the misconduct of which he has been guilty

(a) 10 *M. & W.* 28.(b) 8 *Q. B.* 120.

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did not arise in a matter strictly between attorney and client, but out of a simple loan transaction. I proceed on the general ground that, where an attorney is shewn to have been guilty of gross fraud, although the fraud is neither such as renders him liable to an indictment, nor was committed by him while the relation of attorney and client was subsisting between him and the person defrauded, or in his character as an attorney, this Court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers. Upon this principle the present attorney, *Blake*, must be held responsible, under the circumstances of gross fraud which have been proved against him. Although *Bewers* did, in the first instance, apply to him as an attorney, I think that the transaction ultimately resolved itself into one of a mere loan between them as individuals. *Bewers*, having a sum of money to invest, applied to *Blake*, whom he had known as an attorney, to obtain an investment for him. Thereupon *Blake* offered to borrow the money himself, on the security of his promissory note and the deposit of a mortgage deed of some *Irish* property, in the charge on which he had a share. The property in question having afterwards got into the *Irish* Encumbered Estates Court, *Blake* borrowed the deed of *Bewers* for the purpose, as he alleged, of supporting his claim before that Court. *Bewers*, whose station in life was such that he was not likely to be conversant with matters of this kind, gave up the deed. There is nothing to shew that the true state of things was explained to him: on the contrary, it may be inferred that *Blake* concealed from him two important facts: one, that by means of the temporary possession of the deed he, *Blake*, would be enabled to

receive the money secured to him by it, when the estate was sold by the direction of the *Irish* Court; the other, that *Beevirs* might himself intervene, if he thought fit, and get back his money at the same time. Had this information been given to *Beevirs*, he, no doubt, would not have parted, as he did, with the deed unconditionally; for we find that, on a subsequent occasion, he refused to part with it in order to enable *Blake* to raise a further loan. *Blake*, however, having got possession of the deed, and being fully aware that *Beevirs* considered it to be a valid subsisting security, obtained by its means the money secured to him, and appropriated the whole amount to his own purposes: and for several years afterwards he kept *Beevirs* in entire ignorance of the facts; and, by continuing to pay him interest on his loan, led *Beevirs* to believe that the deed was still a valid and subsisting security. It was urged in extenuation, and may be true, that *Blake*, at the time he borrowed the deed and obtained the money thereby secured to him, was, and continued for several years to be, able to repay *Beevirs* at any time, on a very short notice; that, however, is the kind of excuse which is constantly made in cases of embezzlement, and it cannot prevail with us. These being the facts, we are bound so to deal with the attorney as to hold his case out as a warning, and to shew our vigilance in protecting persons who may have similar dealings with other attorneys. Although, therefore, we shall not take the extreme course of striking him off the roll, we must visit him with a punishment adequate to his offence, by suspending his certificate for two years from 28th *February* last.

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WIGHTMAN J. I am of the same opinion. It is of the

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greatest importance that transactions to which attorneys are parties should be *uberrimæ fidei*, and that the conduct of those who are accredited as officers of the Court should be above suspicion. Now, the facts of the present case are that *Beevirs* first knew *Blake* as an attorney and solicitor, and employed him as such. Afterwards, having some money for investment, he lent it to *Blake*, not on his mere personal security, but also on that of the deposit of a mortgage deed. That *Beevirs* relied upon this deed as a security is shewn by his subsequent refusal to let *Blake* have it for the purpose of raising more money upon it. *Blake* had previously induced *Beevirs* to lend it him for the simple purpose, as he falsely stated, of enabling him to make out his claim in the Encumbered Estates Court. Having by this means been enabled to obtain, and having obtained, payment of the money secured to him by the deed, he said not a word to *Beevirs* about what he had done; but, by continuing to pay him interest on his loan, led him to believe that matters remained on their old footing. This was a transaction so fraudulent as to demand our summary interference.

CROMPTON J. The law as to the summary jurisdiction of the Court over attorneys, as its officers, as laid down in the books of practice, is of wider extent than Mr. *Dowdeswell* is ready to admit. Thus, in *Chitty's Archbold's Practice* (ed. 11, by *Prentice*), p. 146, it is stated that "The Court will, in general, interfere in this summary way and strike an attorney off the roll, or otherwise punish him, for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney,

but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or entrusted with it in consequence of that character." So, in *Lush's Practice*, (ed. 2, by *Stephen*), p. 218, it is laid down that "For any gross misconduct, whether in the course of his professional practice, or otherwise, the Court will expunge the name of the attorney from the roll." In the present case, I cannot say that *Blake's* fraud was not committed in a matter connected with his professional character. If he did not act in it as an attorney, he at all events took advantage of his professional position to deceive *Beevirs*.

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BLACKBURN J. The Court has a jurisdiction, in such cases as the present, to ascertain whether a person accredited as one of its officers is unfit to be so accredited. It is not necessary, in order to induce the Court to interfere in a summary manner, that the misconduct charged should either amount to an indictable offence or arise out of a transaction in which the relation of attorney and client subsists between the attorney and the person against whom he has been guilty of misconduct. Thus, in *Stephens v. Hill* (a), *Alderson B.* says, "The question in this case is, whether the attorney has so misconducted himself in his character of an attorney as to be an unfit person to remain on the roll." "If persons are to be accredited by the Court, it is our duty to watch over and control their conduct." And, in *Rex v. Southerton* (b), after the Court had held that the facts charged against the defendant, an attorney, did not amount to an indictable offence, Lord *Ellenborough C. J.* said "that enough appeared to the Court to satisfy them that the defendant

(a) 10 M. & W. 28. 34.

(b) 6 East, 126. 143.

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 the rolls of the Court;" and he was accordingly struck
 off, his counsel admitting that he could not resist it.

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Rule absolute to suspend *Blake* from
 practising as an attorney of this
 Court for two years from 28th
February, 1860.

Saturday,
June 2nd.
Saturday,
June 9th.

The QUEEN on the prosecution of KAY DINSDALE
 against The Wardens or Keepers and Assistants
 of the Mystery or Art of SADDLERS of the City
 of LONDON.

The charter of
 The Saddlers'
 Company
 empowered
 the Wardens,

MANDAMUS to "The Wardens, or Keepers, and
 Assistants of the Mystery or Art of Saddlers of

or Keepers, and Assistants of the Company to elect Assistants from the Livery; such Assistants to take specified oaths before admission to the exercise of their office. It made the Assistants removable from office by the electing body, for ill government, ill conduct, or any other just and reasonable cause. It imposed certain general restrictions on the eligibility of the members of the Livery as Assistants, and declared that all elections contrary to its directions and restrictions should be void. It then gave power to the Wardens &c. to make such bye-laws as should seem to them salutary, honourable and necessary for the good government of the Company, its members and officers.

By the usage of the Company, persons elected Assistants were eligible to further offices in a routine ending with the office of Warden. The Assistants did not receive or take charge of the Company's funds: but the Renter Warden (whose office was the first in order to which an Assistant was eligible) did, being in fact the treasurer. The Wardens &c., in 1799, duly made a bye-law "That no person who has been a bankrupt or become otherwise insolvent, shall hereafter be admitted a member of the Court of Assistants of this Company, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the satisfaction of the Court or the majority of them."

D., a member of the Livery, but in insolvent circumstances, was elected, in manner pursuant to the charter, an Assistant of the Company. Afterwards, before he knew of his election and before his admission to the office, he made a representation to the clerk of the Company, false to his own knowledge, that he was solvent. He was then sworn in and admitted, and acted in the office. Being afterwards adjudged bankrupt, and his false representation of his circumstances having been communicated by the clerk to the Wardens &c. of the Company, the latter, at a meeting duly held, but of which they gave

the City of *London*," reciting at length letters patent of King *Charles* the Second, dated 24th *December*, in the thirty-sixth year of his reign, being the charter of incorporation of *The Saddlers' Company*; that, on 20th *October*, 1849, there being then a vacancy in the office and number of Assistants of the said Company, the prosecutor, *Kay Dinsdale*, then being a freeman and liveryman and one of the commonalty of the said Company, and duly qualified in that behalf, was, at a meeting or assembly of the Wardens, or Keepers, and Assistants of the said Art or Mystery, duly held and convened by the said Wardens, or Keepers, and Assistants, duly elected and nominated and constituted one of the Assistants of the Mystery or Art aforesaid; and, being so elected, duly took the oaths and made and subscribed the declaration and paid the fees by the said letters patent and the laws of the realm and the laws and ordinances of the said Company prescribed in that behalf, and was thereupon duly admitted to the office of, and became and was and acted as, and duly executed the office of, one of the Assistants of the Mystery or Art aforesaid, and continued to be and to act as such Assistant from thence until the removal thereafter

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D., and of which he had, no notice, removed him from his office.

These facts having been found by special verdict, at the trial of issues raised on a mandamus commanding the Wardens &c. of the Company to restore *D.* to the office: Held, that *D.* was entitled to a peremptory mandamus, both on the ground that the bye-law of 1799 was bad, first, as imposing an unreasonable disqualification on eligibility to the office; and, secondly, as limiting

the disqualification imposed to admission, instead of extending it to election, to the office; and also on the ground that, assuming *D.*'s misrepresentation to have amounted to a corporate offence, which would justify his amotion, he could not be removed without notice and without being heard; nor could his title to the office be tried by a proceeding other than a quo warranto.

Judgment reversed in the Exchequer Chamber; where held that the bye-law was good in substance; for that the disqualification of a bankrupt or insolvent for office in the Company was not unreasonable, having regard to the nature and constitution of the Company; and that the disqualification did not violate the charter by unduly restricting the class from which the Assistants were eligible. Held, further, that the bye-law was good in form; for that, properly construed, it invalidated the election, no less than the admission, of a disqualified person. Held lastly, that granting that *D.*, if in his office, could not have been removed unheard from it for a corporate offence, the facts that he was from the beginning disqualified by the bye-law for the office, and that he procured his admittance to it by fraud, shewed that he never was properly in, and had no right to be restored to, it.

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mentioned ; and that afterwards, on 20th *December*, 1849, although he had not ill-conducted himself, and although he was then duly in and entitled to hold his said office, and no just or reasonable cause existed for his removal therefrom, the defendants wrongfully, unlawfully and against his will, contrary to the tenor of the said letters patent, and without any just or reasonable cause in that behalf, removed, expelled and dispossessed him from the said office, and had from thence hitherto wrongfully, unlawfully and against his will kept him so removed, expelled and dispossessed, and had prevented him from filling or executing his said office, and deprived him of all the liberties, privileges, franchises and benefits to the said office pertaining.

The mandamus then commanded the defendants to restore the prosecutor to his said office, or shew cause to the contrary.

The return alleged that the said letters patent were not fully or truly set forth in the writ, but that divers material portions thereof were omitted, and that in the said letters patent it was contained and provided that every election of any Assistant of the said Corporation, contrary to the directions and restrictions in the said letters patent in that behalf contained, should be void and of no effect ; that the prosecutor was not duly qualified to be elected ; that he was not duly elected, nominated, or constituted one of the Assistants of the Company ; that he had ill-conducted himself and was not duly in, or entitled to hold, his said office ; that there was just and reasonable cause for his removal, and for which he was removed ; and that the defendants did not wrongfully or unlawfully, or contrary to the tenor of the said letters patent, or without just or reasonable cause in

that behalf, remove and keep him removed. That the Company, at the time of the said charter and ever since, have had considerable property and effects, real and personal, and have had the management and care of divers charity and other estates, and the distribution for charitable and other purposes of divers moneys; that, since the granting of the said charter, the Wardens of the Company had been and were elected annually, by ballot, by the Court of Assistants, and from the members constituting that Court; that, by the usage of the Company, a member of that Court was elected in ordinary course to the following offices, namely, first, that of Renter Warden, after serving which for one year he falls back upon the Court of Assistants, and is then successively elected to serve the offices of Quarter Warden, Key Warden, and Prime Warden, or Master, his promotion being regulated by his seniority. That in the Courts the Prime Warden, usually called Master, presides, and has a casting vote in cases of equality of votes. That the Key Warden has the care of the common seal and archives of the Company. That the Quarter Warden acts as receiver of the quarterage, which he pays over to the Renter Warden. That the Renter Warden is the acting treasurer of the Company, performs this duty in person, and receives into his hands and has the sole custody or charge of all the rents, dividends, moneys, plate, linen, goods, chattels and effects of the Company, and its charity and trust estates; having to account to the auditors appointed by the Court of Assistants. That the Assistants attend to the general affairs of the Company, and have the uncontrolled spending of its moneys, the granting of pensions and relief to its decayed members, and the general government of the Corporation and the trade, and have

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and exercise the right of search for deceitfully wrought wares appertaining to the trade of a saddler, and to seize and destroy the same. That the election of new members of the Court of Assistants, when vacancies occur, is made by the Court of Master, Wardens and Assistants, from the Livery, according to seniority, if in a state of solvency, and of good character and repute; and they hold office for life; but in case of misconduct, rendering them unfit, or other sufficient cause, or receiving parochial aid, or petitioning the Court for relief, they would cease to receive their summonses to attend the Court. That, should a member of the Court come to decay and petition to be relieved out of the funds of the Company, it is understood as a matter of course that, after he has received his first quarter's pension, he is no longer to be summoned to the Court, and at the following Court a member moves that there be a call from the Livery to supply the vacancy; but the party so amoved is not deprived of his Livery. That the same course has been pursued in case of misconduct amounting to unfitness or incompetency. That, on 23rd *April*, 1799, in pursuance of the power contained in the charter, the Wardens and Assistants of the Company, at a meeting duly convened and constituted, made and ordained a law and ordinance, which has ever since been and still is in force, and is as follows:—“Resolved, that no person who has been a bankrupt or become otherwise insolvent shall hereafter be admitted a member of the Court of Assistants of this Company, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the

satisfaction of the Court or the majority of them." That the prosecutor knew of this law, and did, just before the time of his alleged election and admittance, for the purpose of inducing and procuring the then Wardens, or Keepers, and Assistants of the Company to elect and admit him to be an Assistant, falsely and fraudulently represent and state, and cause to be represented and stated, to the said Wardens, or Keepers, and Assistants, that he then was solvent and able to pay his creditors twenty shillings in the pound, whereas, in truth, he then was, and he thence hitherto has been, insolvent, and he then was largely indebted to divers persons, to wit, to the amount of 10,000*l.*, and was wholly unable to pay his creditors 20*s.* in the pound, or any dividend whatever, as he then well knew; and the said creditors never have been paid their said debts, or any part thereof, except a small and insignificant dividend of 2*s.* 8*d.* in the pound, which, and no more, has at length, after great delay, been paid to the said creditors under the bankruptcy hereinafter mentioned; and that, by means of the said false and fraudulent representation, the prosecutor induced and procured the said then Wardens, or Keepers, and Assistants, to elect and admit, and he was then, by and through means of the fraud aforesaid, and not otherwise, elected and admitted as in the writ mentioned. That, at the time of the said representation, and thence until he became bankrupt, the prosecutor was a trader, to wit, a saddler, subject to the statutes concerning bankrupts, and had committed an act of bankruptcy; and that, shortly after the alleged election and admittance, he was adjudicated bankrupt, and assignees in bankruptcy were appointed; and that thereupon, and whilst the prosecutor was such

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The prosecutor pleaded the following pleas:—

1. That the letters patent are truly set forth in the said writ of mandamus, and that no material portion thereof is omitted as alleged; that prosecutor was duly qualified to be elected an Assistant as in the said writ mentioned in manner and form therein alleged, and that he was duly elected, nominated, and constituted one of the Assistants of the said Mystery, or Art, in manner and form as in the said writ alleged; that he had not ill-conducted himself as in the said return alleged, and was duly in and entitled to hold his said office of Assistant as in the said writ alleged, and that there was no just or reasonable cause for his removal therefrom before or at the time of the alleged removal as in the said return alleged; that the said Corporation did wrongfully and unlawfully, and contrary to the tenor of the said letters patent, and without just or reasonable cause, remove, expel and dispossess prosecutor from his said office, in manner and in form as in the said writ alleged, and that they did and do wrongfully and unlawfully keep him so removed and dispossessed; that no such law or ordinance was made or ordained as in the said return is alleged,

and that the said law or ordinance did not continue to be nor was it in force at the times in the said return in that behalf mentioned, as therein alleged; that prosecutor did not falsely and fraudulently represent or state, or cause to be represented or stated, to the said Wardens, or Keepers, and Assistants, as in the said return in that behalf alleged; and that he was duly elected and admitted as in the said writ mentioned, and not by or through any fraud as in the said return alleged; that the meeting, or assembly, in the said return alleged to have been held on 20th *December*, 1849, was not duly convened as alleged; that prosecutor was not removed or discharged, and did not cease to be, but at the time of the teste of the writ was, and still is, one of the Assistants of the said Art or Mystery, and entitled to be admitted thereto.

2. As to so much of the return as relates to the alleged removal or discharge of prosecutor under the authority of the resolution of the meeting or assembly alleged to have been held on 20th *December*, 1849: That, although, before and at the time of the said alleged meeting or assembly, he was an Assistant of the said Art or Mystery, and was, as such, entitled to be summoned to the meeting or assembly, and to attend the same, he was not summoned to the said meeting or assembly, nor had he any notice thereof until after the same had been held, nor did he attend the same, nor had he any opportunity of attending the same.

The defendants joined issue on these pleas.

The case came on for trial, before *Lord Campbell* (then C. J. of this Court), at the sittings in *London* after *Michaelmas* Term, 1858, and a special verdict was afterwards settled by him, which, so far as is material, was as follows:—

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That the letters patent granted by King *Charles* the Second to the defendants, referred to in the writ of mandamus, are in the words and figures set forth in the Latin copy of the charter hereunto annexed.

That, on 23rd *April*, 1849, the following resolution was made and passed by the persons entitled to elect to the office hereinafter mentioned. "It having been resolved and ordered at the last Quarter Court, held on 20th *January* last, that one of the Livery should be called on the Court of Assistants, it was thereupon resolved that the following gentlemen of the Livery should be put in nomination, whereout to choose one, namely," [here followed several names, of which prosecutor's was one]. "Resolved, that this Court do now proceed to such election, and that the same be by way of scoring; whereupon all the above named being written on a sheet of paper, the scoring opposite to their names took place, when the unanimous choice was declared to have fallen upon Mr. *Kay Dinsdale*, who was thereupon declared duly elected on the Court of Assistants accordingly." This resolution was confirmed at the subsequent meeting of the Wardens and Assistants, held on 25th *July*, 1849.

That each of the said Courts was in all respects duly constituted, and competent to elect the said *Kay Dinsdale* an Assistant of the said Company, and the mode of election was the mode usually adopted in the election of an Assistant of the said Company; but the said resolution was not communicated to the said *Kay Dinsdale* until after the representations hereinafter referred to had been made, when (that is to say) on 16th *October*, 1849, he was summoned to attend a Court of the said Art or Mystery as an Assistant of the same.

That, at the time of the making and passing of the said last mentioned resolution, and from thence continually up to, and at, the time of the alleged removal of the said *Kay Dinsdale* from his said office of Assistant, as hereafter mentioned, the said *Kay Dinsdale* was in insolvent circumstances, and unable to pay his creditors 20s. in the pound; and during all such time he then owed large sums of money, on judgments and otherwise, to divers persons, which debts have always remained unpaid and unsatisfied; but he was in other respects duly qualified to be elected an Assistant.

That the said *Kay Dinsdale* attended the Court of the Wardens and Assistants, on said 20th *October*, 1849, in obedience to the said summons, and on that occasion accepted the said office, and was sworn in and acted as an Assistant, and was again summoned to attend, and attended, the next Court of the Wardens and Assistants of the said Company, which was held on 6th *November*, 1849, and on each of those occasions received his fees and acted as an Assistant, and was in all respects received and treated as an Assistant of the Company by the other members of the said Court of Assistants.

That the said *Kay Dinsdale* did not, except with regard to the representations hereafter referred to, ill-conduct himself as in the return alleged.

That the defendants did remove, expel, and dispossess the said *Kay Dinsdale* from the said office, if he was in or holding the same, on 20th *December*, 1849, being after the making of the representations hereafter mentioned; and that they have kept him so removed and dispossessed from thence hitherto.

That on 23rd *April*, 1799, the then Wardens and Assistants of the said Art or Mystery, at a meeting or

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That a person holding the said office, from which the said *Kay Dinsdale* was so removed as aforesaid, might, by reason of his being in such office, be elected to the office of Renter Warden, which last mentioned office was, during all the times aforesaid and after mentioned, an office of trust, and the person for the time being holding the said last mentioned office might, by virtue of such office, receive large sums of money belonging to the said Wardens, or Keepers, and Assistants, and which moneys had to be applied for charitable purposes and otherwise.

That the said *Kay Dinsdale* did, after the making and passing of the said resolution on 23rd *April*, 1849, but before the same was communicated to him, or he was summoned or admitted to the said office as aforesaid, to wit on 24th *September*, 1849, in answer to an inquiry which *Giles Clarke*, then being the agent in that behalf of the said Wardens, or Keepers, and Assistants, made of him as to his solvency, represent and state to the said *Giles Clarke* that he, *Dinsdale*, then was quite as solvent as any man of the said Court, and able to pay his creditors 20s. in the pound; whereas in truth the contrary then was and thence hitherto has been the fact, as he, *Dinsdale*, then well knew; and the said creditors never were paid their said debts, or any part

thereof, except a small dividend of 2s. 8d. in the pound, which and no more, after great delay, was paid to them under the bankruptcy in the said return referred to; and by means of the said false and fraudulent representations the said *Kay Dinsdale* induced and procured the said then Wardens, or Keepers, and Assistants, to admit him to the said office as aforesaid.

That the said *Giles Clarke*, as such clerk and agent as aforesaid, after the making of the said representations, so made as aforesaid, and in consequence thereof, caused the said *Kay Dinsdale* to be summoned as aforesaid to attend the said meeting, which it is alleged the said *Kay Dinsdale* attended as aforesaid, and caused the fact of the said election to be communicated to him the said *Kay Dinsdale*.

That the said representations were not communicated by the said *Giles Clarke* to any Court of the then Wardens and Assistants of the said Company, until 20th *October*, 1849, which was the first Court of the said Wardens and Assistants held after the said representations were so made as aforesaid.

That afterwards, on 30th *November*, 1849, the said *Kay Dinsdale* did become and was declared bankrupt, as in the said return alleged.

That the said *Kay Dinsdale* was not summoned to the said meeting or assembly of the said Court of Assistants in the said return alleged to have been held on 20th *December*, 1849, but the said meeting or assembly was in other respects duly convened, although he then resided in the same place where he had resided from the said 23rd *April*, 1849, and where he resided when summoned to the previous Courts to which he had been summoned as aforesaid, and within a reasonable and convenient

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distance, namely within three miles of *Saddlers' Hall*, where the said meeting and all other meetings of the said Wardens and Assistants were holden, and where the business of the said Company was transacted.

That all Assistants of the said Art or Mystery, duly elected and admitted in that behalf, were entitled to be summoned to the said meeting or assembly held on 20th *December*, 1849, and to attend the same.

That the said *Kay Dinsdale* had no notice of the said meeting or assembly until after the same had been held.

That he did not attend the same, and had no opportunity of attending the same.

[The verdict concluded in the old prolix form, giving the findings of the jury on the several facts, contingently upon the judgment of the Court.]

A translation of the Latin copy of the charter annexed to the special verdict accompanied the case. The following extracts from it are all that appear material:—

The charter commenced by incorporating the Company, by the name of "The Wardens, or Keepers, and Commonalty of the Mystery or Art of Saddlers in the City of *London*." It then provided "That from henceforth for ever, at all times hereafter, there may and shall be four of the freemen of the same Mystery, in the form in these our letters patent within specified, to be elected, appointed, constituted and instituted, who shall be and be called Wardens or Keepers of the Mystery or Art of Saddlers of the City of *London*; and twenty of the freemen of the same Mystery, in the form in these presents within mentioned, to be nominated and constituted, who shall be and be called Assistants of the Mystery or Art aforesaid." It then named the persons who were to be the

first Wardens and Assistants, and who were "to continue in such offices during their natural lives, unless in the meanwhile they, or any of them, shall be removed for ill government, or ill conducting themselves in that behalf, or for any other reasonable cause." Powers for the election and removal of Wardens followed. It was then provided "That, as often and whenever it shall happen that any one or more of the Assistants of the Commonalty aforesaid shall at any time hereafter die, or retire, or be removed from his or their office, (and we will that he or they shall, for ill government, or ill conduct, or for any other just and reasonable cause, be removable and removed by the Wardens, or Keepers, and Assistants of the Art or Mystery aforesaid for the time being, or the greater part of them then present, whereof we will that one of the Wardens, or Keepers, for the time being shall be one), that then and so often it may and shall be lawful to the Wardens, or Keepers, and the rest of the Assistants then living, or the greater part of them then present, whereof one of the Wardens, or Keepers, of the Art or Mystery aforesaid for the time being shall be one, at their pleasure, from time to time and at all times hereafter, to elect and nominate one other or more of the Commonalty of the Art or Mystery aforesaid for the time being, in the place or places of him or them so dead or removed as aforesaid; and that he or they, so elected or nominated to the office of Assistant of the Art or Mystery aforesaid, before they or any of them shall be admitted to the execution of their office or offices ("antequam ad executionem officii sui vel officiorum suorum admittantur, seu eorum aliquis admittatur") shall take, and each of them shall take, a corporal oath upon the Holy Gospels of God for the due execution of the office of Assistant of

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the Art or Mystery aforesaid, before the Wardens or Keepers of the Commonalty aforesaid, or the greater part of them then present. To which said Wardens, or Keepers, and Assistants of the Art or Mystery aforesaid for the time being, or the greater part of them then present, We do for us, our heirs, and successors, by these presents, give and grant full power and authority to tender and administer such oath." The charter further required the Wardens, or Keepers, and Assistants, before admission to the execution of their respective offices, to take the oaths of allegiance and supremacy, the oath prescribed by the Act (13 *Car.* 2. st. 2. c. 1.) for the well government and regulation of Corporations, and the oath for the due execution of their offices respectively. No persons were to be eligible as Wardens, Keepers, or Assistants, who, respectively, before their election, should not hold communion with the Church of *England*, and should not, within six months at the least before such election, have received the Sacrament.

Then followed a proviso, "That every election of any Warden, or Keeper, Assistant, or Clerk, of the Company aforesaid, contrary to the directions and restrictions in these presents in that behalf mentioned, shall be void and of no effect to all intents and purposes whatsoever." It was then declared "That the Wardens or Keepers aforesaid, together with eight Assistants, at the least, of the Mystery aforesaid, for the time being, in any meeting met together and assembled, shall have, and by these presents may have, full authority and power to enact and make institutions, ordinances, and constitutions ("plenam auctoritatem et facultatem condendi et faciendi institutiones, ordinationes, et constitutiones"), which to the same Wardens, or Keepers, and the eight

Assistants aforesaid, at the least, shall seem good, salutary, useful, honourable ("honestæ"), and necessary, according to their sound discretions, for the good rule and government of the Wardens, or Keepers, and Freemen and Commonalty of the Mystery aforesaid, and the officers and ministers of the same Mystery for the time being; and for the declaring in what manner and order the aforesaid Wardens, or Keepers, and Freemen, and Commonalty, and other the men and every the ministers, officers, artificers and freemen, and apprentices, and servants of such Mystery or Art, in their duties, services, workmanship and businesses, touching and concerning the Mystery or Art aforesaid, and liberties of the same, shall conduct, behave, and exercise themselves; and otherwise for the further public good and common benefit and safe and quiet government of the Mystery or Art aforesaid." And power was given to such Wardens, or Keepers, and Assistants, to enforce the observance of the institutions, ordinances and constitutions, so to be made, by imposing penalties and fines on disobedience; "so nevertheless, that such ordinances, institutions and constitutions be not repugnant or contrary to the laws and statutes of our kingdom of *England*, or the provisos and limitations aforesaid, or contrary to the customs of the city of *London*, or contrary to the liberties, jurisdictions, or privileges of the Mayor and Commonalty and citizens of the City aforesaid."

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Gibbons, for the Crown. A peremptory mandamus ought to be awarded for the restoration of the prosecutor to his office of Assistant of the defendant's Company. The special verdict substantially finds all the allegations in his pleas in

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his favour. The charter, annexed to the verdict, agrees in effect with the statement of it in the writ. Then, it is found that the prosecutor was elected, and the election was confirmed, in due course. Thereupon, he became entitled to be admitted to the office; and, having been in fact admitted, cannot be ousted from it under the bye-law of 23rd *April*, 1799. Assuming that bye-law to be good and valid, it does no more than prohibit the admission, to the office of Assistant, of a person who has become bankrupt or insolvent; it can have no operation to invalidate, *ex post facto*, the admission of such a person. [*Wightman J.* The defendants allege, in the return, that the prosecutor obtained the admission by false and fraudulent representations that he was solvent]. The admission was not vitiated, even if obtained by fraud; its validity being founded on the previous election, which gave the prosecutor title to admission. After electing him, it was too late for the defendants to say that he was disqualified for admission; *Rex v. Ward (a)*. If he was in other respects entitled to be admitted, the fact that he might be responsible, in some way, in respect of his misrepresentation, would not take away his right to admission; *Townshend's Case (b)*. [*Wightman J.* If the bye-law is to have any effect at all, it must prevent the admission of an insolvent to the office of an Assistant in the Company. *Blackburn J.* If your argument, that admission must follow on election as a matter of course, is well founded, the bye-law is bad.] The prosecutor contends that the bye-law is bad, for this reason, that it seeks to impose a disqualification

(a) 2 *Str.* 893.

(b) 1 *Lev.* 91.

for the office in question not recognised by the common law. By the common law insolvency constitutes no disqualification for a corporate office, the holder of which has nothing to do with the receipt, or trust, or management, or fingering of the money of the Corporation, nor can have anything to do with it, unless the rest of the Corporation should, by a corporate act of their own, trust him with it. The law was laid down to that effect by Lord *Mansfield* C. J., in *Rex v. Mayor &c. of Liverpool* (a). In the present case, although the Assistants of the Company are eligible to the further office of Renter Warden, which, unlike that of Assistant, involves the management of the Company's funds, an Assistant does not necessarily take the higher office, nor is the Company obliged to confer it on him. In *Rex v. Chitty* (b) it was held that an uncertificated bankrupt is not disqualified from being elected a councillor for a borough and holding the office, under The Municipal Corporations Reform Act, unless he become bankrupt while holding it. That case was decided on the language of the statute in question, but shews that, apart from legislative prohibition, a bankrupt is equally eligible to office as a solvent person. So, in *Regina v. Owen* (c), it was held that pecuniary embarrassment and insolvent circumstances do not constitute "inability" to perform the office of clerk of a County Court, within the meaning of stat. 9 & 10 *Vict. c. 95. s. 24*. Still less ought they to be considered as debarring the holder of a freehold office, which that of Assistant to the defendants' Company is, and that of a County Court clerk is not, from retaining it. Again, the bye-law is bad, because it

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(a) 2 *Burr.* 723. 733.(b) 5 *A. & E.* 609.(c) 15 *Q. B.* 476.

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was never sanctioned in the manner required by stat. 19 Hen. 7. c. 7. (a), which enacts "That no Masters, Wardens, and Fellowships of Crafts or Mysteries, nor any of them," "take upon them to make any acts or ordinances, ne to execute any acts or ordinances by them heretofore made" "against the common profit of the people, but that the same acts or ordinances be examined and approved by the Chancellor, Treasurer of *England*, or Chief Justices of either Benches, or three of them, or before both the Justices of assize in their circuit or progress in that shire where such acts or ordinances be made, upon pain of forfeiture of xl. li. for every time that they do contrary." [Cockburn C. J. I do not think that the bye-law is such as that Act refers to. *Wightman J.* Supposing that the bye-law is within the scope of that Act, it is not bad merely because not allowed as the Act directs.] Another ground on which the bye-law is bad is that it is unreasonable in itself, as practically narrowing the number of members of the Company who are eligible to the office of Assistant, and eliminating therefrom all who have at any time been in insolvent circumstances. It is therefore bad, as attempting to alter the qualification of persons before eligible, beyond what the original constitution of the Company required; *Rex v. Tappenden (b)*. In *Rex v. Attwood (c)*, though it was unnecessary to decide the point, the Court appears to have thought that a bye-law narrowing the body of persons eligible to office in an incorporated mercantile Company, would be bad. That case was followed in *Regina v. Powell (d)*. [Cockburn C. J. Do you say that

(a) "For making of statutes by bodies incorporate."

(b) 3 *East*, 186.

(c) 4 *B. & Ad.* 481.

(d) 3 *E. & B.* 377.

a bye-law excluding from eligibility persons convicted of felony, and who had undergone their sentence, would be bad?] It is not necessary to go so far as that. In *Baggs' Case* (a) the crimes are specified, upon attainder for which a citizen or freeman of a Corporation may be removed. But both that case and *Sir Thomas Earle's Case* (b) shew that there can be no cause to disfranchise a member of a Corporation, unless it be for something done which works to the destruction of the body corporate, or of its liberties and privileges. The bye-law is also bad, even if the exclusion of an insolvent from office is justifiable in itself, because it does not declare an insolvent ineligible, but merely prohibits his admission to office. Admission forms no part of the election, but stands to it in a relation analogous to that of the delivery of an executed deed to the execution. The prosecutor having been elected, the office is full, and no one can be elected in his place. The only remaining question which arises on the findings as to the issues joined on the first plea, is, whether the prosecutor's misrepresentation of the actual state of his circumstances constituted such fraud as to avoid his election. Now it is clear that although fraud may avoid a contract, it cannot divest an estate already vested. The misrepresentation, though made before the prosecutor was admitted, was made after he had been elected; and therefore did not nullify the election. [*Blackburn J.* I doubt whether, in the present case, the prosecutor's election was complete before his admission. A mandamus would go, after election, to compel admission; and I am disposed to think that, before admission, a quo warranto would not lie. *Crompton J.* A quo

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(a) 11 Rep. 93 b. 99 a.

(b) Carth. 173. 176.

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warranto might lie, before the admission of the person elected, if another person than he was admitted.] The prosecutor's election was in no way influenced by the misrepresentation, which, if it amounted to fraud, related to matters upon which *Clarke* had no right to question the prosecutor, and which he was under no legal obligation to *Clarke* to disclose with accuracy. It was not, therefore, such fraud as to invalidate the transaction; *Vernon v. Keys* (a). Fraud on matters collateral to a contract does not absolutely avoid the contract; *White v. Garden* (b), *Feret v. Hill* (c). Lastly, the issue on the second plea is found entirely in favour of the prosecutor, and, upon that finding alone, he is entitled to a peremptory mandamus; he having been removed from his office at a meeting of which he had no notice, to which he was not summoned, and which he had no opportunity of attending in order to defend himself; *Baggs' Case* (d), *Rex v. Gashin* (e).

Knowles, contra. By the charter of the Company, the majority of the Wardens, or Keepers, and Assistants, present at the time, may remove an Assistant from his office for ill conduct, or for any other just and reasonable cause. And the charter contains a proviso, that every election of, amongst others, any Assistant, contrary to the directions or restrictions therein mentioned, shall be void and of no effect. It then, in very general terms, gives power to the Company to make bye-laws. The bye-law in dispute, of 23rd *April*, 1799, does not go beyond that power. Being made at a time when there was no Insolvent Act in existence, it evidently was intended to

(a) 12 *East*, 632.

(b) 10 *C. B.* 919.

(c) 15 *C. B.* 207.

(d) 11 *Rep.* 93 b.

(e) 8 *T. R.* 209.

exclude from the office of Assistant any person who was or had been in insolvent circumstances, that is, according to *Parker v. Gossage* (a) and *Biddlecombe v. Bond* (b), of general inability to pay his debts. The prosecutor's election was therefore void, by reason of the proviso in the charter; being contrary to the directions and restrictions contained in the bye-law. A bye-law is void if repugnant to the charter, *Tucker v. Rex* (c); but here the bye-law is in strict accordance with the charter. The material question is, was the prosecutor duly qualified to be elected? It must be owned that the bye-law in terms points to admission, only, as that for which insolvency is to disqualify; but, reading the bye-law and the proviso in the charter together, the meaning must be that an insolvent person is not to be elected. Election gives but an inchoate right, which is perfected by admission. The next issue is, whether the prosecutor was duly elected, nominated and constituted an Assistant of the Company. Now, even assuming him to have been duly elected and nominated, he never was constituted an Assistant. "Constituted" must have some meaning, and must refer to the perfecting of election by admission. But inasmuch as the prosecutor obtained his admission by fraud, the admission was invalid and voidable by the defendants, who did in fact avoid it as soon as they discovered the fraud. The fraud bears out the allegation in the return, that the prosecutor had ill conducted himself. Then, was he duly in and entitled to hold his office? He could be so only by being duly sworn in and admitted, as enjoined by the charter. The title to every office is grounded on two things; the election of the party, and

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(a) 2 C. M. & R. 617.

(b) 4 A. & E. 332.

(c) 2 Bro. P. C. 304.

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his being sworn into the office; *Rex v. Ellis* (a) and *Regina v. Humphery* (b). And though the prosecutor was, de facto, sworn in and admitted, the admission, having been obtained by fraud, must go for nothing. Next, assuming the prosecutor to have been duly in the office, the defendants had power to remove him from it for just and reasonable cause; and, if the Court can see that such cause existed, it will not be astute to defeat the removal on the ground of want of form in the mode of procedure. The question whether there was just and reasonable cause depends on whether or not the disputed bye-law is a good one. The bye-law is objected to by the other side on the ground that it is in contravention of the common law. But every bye-law must, to some extent, abrogate what was before of common right. Moreover, the cases cited on the other side to shew that insolvency does not disqualify from office, at common law, turned upon the particular facts in each, and by no means bear out such a general proposition. And the fact that, here, the election of the prosecutor as an Assistant put him in the way of being made Renter Warden, and, as such, entrusted with the money of the Company, disqualified him, as being an insolvent, from remaining an Assistant, according to the dicta of Lord Mansfield C. J., in *Rex v. Mayor &c. of Liverpool* (c), which were referred to on the other side. [Cockburn C. J. Although he might be ineligible on that ground, as Renter Warden, it does not follow that he could not be elected an Assistant.] Again, the rule that a bye-law restricting the number of persons eligible to an office is bad, refers only to a restriction of the class eligible; the limitation, for instance, of an

(a) 9 *East*, 252, n. (a).

(b) 10 *A. & E.* 335.

(c) 2 *Burr.* 723. 733.

office, theretofore open to all members of a trade, to some only. Thus, the bye-law which was held bad in *Rex v. Tappenden* (a) was an attempt to narrow the class of persons who might be taken as apprentices by the freemen of a Company, by the custom of which every person who had served an apprenticeship of seven years to a freeman was entitled to the freedom. But it does not follow that a bye-law imposing a qualification (for instance, the passing an examination, or the possessing certain acquirements, or the being approved of) on the whole of a class, is invalid. Such bye-laws were upheld in *Rex v. The College of Physicians* (b), *Rex v. Master, &c., of the Company of Surgeons* (c), *Green v. Mayor of Durham* (d). The *Case of the Tailors of Ipswich* (e) shews the limits within which such bye-laws may be made. The bye-law in the present case is a reasonable regulation; for, in the majority of instances, insolvents and bankrupts are not fit persons to hold responsible offices; and *ad ea quæ frequentius accidunt jura adaptantur*. Lastly, the defendants having removed the prosecutor for a reasonable cause, the objection that the removal was informal, because he was not summoned to the meeting at which it took place, ought not to prevail. The defendants admit that the prosecutor ought, in strictness, to have had notice of that meeting; but the question is, whether the Court, in the exercise of its discretion, will grant him a peremptory mandamus if of opinion that, though improperly removed from his office, he deserved amotion. Should the mandamus go, the prosecutor may, notwithstanding, be formally removed

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(a) 3 *East*, 186.(b) 7 *T. R.* 282.(c) 2 *Burr.* 892.(d) 1 *Burr.* 127.(e) 11 *Rep.* 53.

1860. de novo for the same cause. That consideration shews
 The QUEEN that the mandamus ought not to be awarded; *Rex v.*
 v. *Tidderley (a)*, *Rex v. Mayor, &c., of Axbridge (b)*, *Rex v.*
 SADDLERS' *Griffiths (c)*, *Tapping on Mandamus*, p. 401.
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Gibbons, in reply. Even supposing that the bye-law is good, and that the prosecutor's fraud was so directly connected with his election as to give the defendants just and reasonable cause to remove him, they still cannot justify the manner in which he was removed: for they were not competent judges in their own cause, without giving him an opportunity of being heard. The material allegation in the writ is the removal; it was not for the defendants to judge of the prosecutor's title; *Rex v. Lyme Regis (d)*. The prosecutor having been de facto elected to the office, and having accepted and acted in it, his title to it cannot be tried by a mandamus, but only by quo warranto; *Frost v. The Mayor of Chester (e)*. As was said by *Raymond C. J.* in *Rex v. Hull (f)*, "in cases of a mandamus where there appears the least right for the plaintiff, a peremptory mandamus must go." The prosecutor's misrepresentation of the true state of his circumstances, however, if a fraud on the defendants, was a fraud collateral to his election and admission, which it therefore did not affect; *Mason v. Ditchbourne (g)*, *Stewart v. Aston (h)*, *Feret v. Hill (i)*. But the bye-law is invalid. In *Rex v. The College of Physicians (j)* the bye-laws held good were made in

(a) *Sid.* 14.

(c) 5 *B. & Ald.* 731.

(e) 5 *E. & B.* 531.

(g) 1 *M. & R.* 460.

(i) 15 *Com. B.* 207.

(b) *Cowp.* 523.

(d) 1 *Doug.* 79.

(f) 11 *Mod.* 390.

(h) 8 *Irish C. L. Rep.* 35.

(j) 7 *T. R.* 282.

furtherance of the objects of the College. And in *Rex v. Master &c. of the Company of Surgeons* (a) the person seeking to be bound an apprentice had no inchoate right to be so: whereas the present prosecutor had an inchoate right to admission as soon as he was elected. The bye-law in *Green v. Mayor of Durham* (b) related merely to the mode of admission. Here, the bye-law narrows the number of persons eligible as Assistants of the Company, and on that ground is bad. Lastly, the Court has no discretion as to awarding a peremptory mandamus if the return is insufficient. All that the Court has now to try is the sufficiency of the return; *Regina v. Mayor of Norwich* (c), *Buckley v. Palmer* (d), *Corner's Crown Practice*, p. 236. By stat. 9 Ann. c. 20. s. 2., "in case a verdict shall be found for the person" "suing" a writ of mandamus, "a peremptory writ of mandamus shall be granted without delay, for him" "for whom judgment shall be given."

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COCKBURN C. J. I am of opinion that the prosecutor is entitled to a peremptory mandamus. It appears to me that the bye-law, which is said to disqualify him from holding his office, is bad. It is not necessary to go the length of saying that where a corporate body, created by charter, imposes some qualification for office, common to all the members of the constituent body alike, in addition to the qualifications prescribed by the charter, the qualification so imposed is necessarily bad, although it does not limit the area of eligibility and is a reasonable regulation under all the circumstances. Without going that length, I think that the present bye-law is bad on

(a) 2 Burr. 892.

(b) 1 Burr. 127.

(c) 2 Ld. Raym. 1244.

(d) 2 Salk. 450.

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two grounds. First, the qualification which it seeks to impose is not a reasonable one. It requires that every member of the body at large of the Company, out of which the Assistants are to be chosen, shall, in order to be eligible as an Assistant, either never have been bankrupt or insolvent, or, if he ever has been so, shall have afterwards paid his creditors in full, or have established an honourable character for seven years subsequent to his bankruptcy or insolvency. Now I think that that is an unreasonable test of qualification. Bankruptcy or insolvency may be perfectly innocent, the result of mere misfortune or misadventure in business; and a bankrupt may receive a first class certificate, preserve his character unimpaired, and satisfy his creditors, although he be unable to pay twenty shillings in the pound. It seems to me, therefore, to be unreasonable to lay down a rule that a man so circumstanced shall be necessarily ineligible as an Assistant of the Company, or eligible only after a seven years' probation. But there is a fault in the bye-law which is, if possible, still more serious. Even assuming that the ground of disqualification which it imposes is reasonable, the bye-law has the defect of making the disqualification operate against admission merely, and not also against election. But the duty of admitting to office a person who has been elected to it is purely ministerial; the bye-law, therefore, if it could have properly made insolvency a disqualification at all, should have made it a disqualification, not for admission, but for election. The electors have a right to elect any one who is not disqualified for election; and, when an eligible person has been once elected, the Court of the Company have no other duty left than to admit him to the office to which he has been so elected. Then, as to

the second ground on which the grant of this mandamus has been resisted, namely, that the prosecutor was guilty of a corporate offence, for which he is liable to be removed from his office, in knowingly answering falsely the questions, as to his solvency, put to him with a view to his admission, it is unnecessary to decide whether this was such a corporate offence as would justify his amotion. It is admitted that he had no notice of his intended amotion on this ground. He therefore had not the opportunity, which the old established rule in such cases requires that he should have had, of being heard in explanation of the matters alleged against him. Without saying, therefore, whether or not there was a sufficient ground for his amotion, had he been heard and been unable to explain his conduct satisfactorily, his amotion was, under the circumstances, clearly bad. I am therefore of opinion, upon both points, that the peremptory mandamus ought to issue.

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WIGHTMAN J. This is an application for a mandamus to restore the applicant to an office from which he was removed while de facto in possession of it, on the ground of alleged misconduct by him in obtaining it by fraud and misrepresentation. Without determining whether or not the circumstances presented to us in this case shew such fraud as would justify the amotion of a corporate officer, this much appears clear, that the applicant had no notice of the proceedings that were to be taken against him, and therefore had no opportunity of explanation and defence. I agree with the Lord Chief Justice that upon that ground the peremptory mandamus ought to issue. But it is further said that the applicant never was in the office at all, being disqualified

1860. from holding it by the bye-law which has been discussed.
The QUEEN v. SADDLERS' Company. Now there are numerous authorities, which were cited during the argument, and to which I need not again refer, to shew that if a person is, although disqualified, elected and actually admitted into an office, the only way of removing him is by quo warranto, and that the objection that he never ought to have been admitted cannot be taken in other proceedings. In the present case, the prosecutor is now actually in his office, inasmuch as he could not be lawfully removed from it without being called on to make his defence. It appears to me, as I have said, that, for that reason alone, a peremptory mandamus ought to be awarded. But I further agree, also, with the Lord Chief Justice, that the bye-law itself cannot be supported. It seems to me to be unreasonable. [His Lordship read the bye-law.] It is open to the objection, mentioned by the Lord Chief Justice, that the disqualification which it imposes goes only to the admission, not to the election, of the officer. And it unreasonably prohibits the admission of a man who, though he has been bankrupt or insolvent, has satisfied all his creditors, unless he has paid them 20*s.* in the pound, although he may have behaved most honourably and conscientiously in paying them it may be 19*s.* or 19*s.* 6*d.* in the pound; and although those who elected him may have considered him a most honourable person. For all these reasons, I am of opinion that a peremptory mandamus ought to be awarded.

CROMPTON J. (who had been absent during part of the argument). I merely wish to say that, so far as I have heard the argument, I entertain a strong opinion in

favour of the Crown; but, as I had not the advantage of hearing Mr. *Knowles*, I take no part in the decision.

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BLACKBURN J. I entirely agree with the judgment of the rest of the Court. I think that the question of the validity of the bye-law settles the other points in the case. For the reasons which have been already given, and which I will not repeat, I think that it was beyond the competency of the body corporate to impose the condition on the admission of the prosecutor to office which is imposed by the bye-law. I also agree that the prosecutor, once elected and admitted to office, could not be removed without notice of the proceedings, even for an offence which would justify his motion. As to the objection urged by Mr. *Knowles*, that, supposing the prosecutor to be restored, the defendants might, upon what appears on the special verdict, proceed to remove him in a formal manner, and that we, therefore, ought, in the exercise of our discretion, to refuse to award a peremptory mandamus, I think that we are bound, now that by a recent statute (a) error can be brought on our judgment, to give a judgment on which error will lie, and to decide whether the prosecutor is or is not entitled to a peremptory mandamus. And in my opinion he is so entitled, on the facts before us, whether or not he has been guilty of an offence which will justify his motion hereafter; a point on which I express no opinion.

Judgment for the Crown, that a peremptory mandamus do issue.

(a) Stat. 6 & 7 Vict. c. 67. s. 2.

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IN THE EXCHEQUER CHAMBER.

[Saturday,
January 12th.]

(Error from the Court of Queen's Bench),

For marginal
note, see ante,
p. 42.

The QUEEN, on the prosecution of KAY DINSDALE, respondent, *against* the Wardens or Keepers and Assistants of the Mystery or Art of SADDLERS of the City of LONDON, appellants.

FROM the above decision the defendants appealed.
The case was argued in last Michaelmas Vacation (a).

Knowles (*Rochfort Clarke* with him) argued for the appellants; *Gibbons* for the Crown. *Rochfort Clarke*, by leave of the Court, replied.

The arguments were substantially the same as in the Court below.

MARTIN B. now delivered the judgment of the Court.

This was a mandamus directed to the Wardens and Assistants of *The Saddlers' Company*, commanding them to restore the prosecutor, *Kay Dinsdale*, to the place of an Assistant upon the Court of the Company. The writ recited the charter of King *Charles II.*, incorporating the Company, which gave, inter alia, power to appoint

(a) *Tuesday, November 27th, and Wednesday, November 28th*; before *Willes and Keating Js., Martin, Channell and Wilde* ^{Re.}

future Wardens and Assistants, by election and admittance, both of which proceedings are expressly mentioned in the charter ; a power to remove Assistants for ill government or ill-conducting him or themselves, or for any other just or reasonable cause ; and a power to make such bye-laws as should seem "good, useful, honest, and necessary, according to their sound discretions, for the good rule and government of the Wardens, or Keepers, and freemen and commonalty of the Mystery or Art, and officers and ministers of the same Mystery for the time being," and to declare "in what way or order the aforesaid Wardens or Keepers, freemen and commonalty, and other men of the said Mystery or Art, should use and conduct themselves in the office, ministry, artifice, and business of the said Mystery or Art, and otherwise for the public good and general utility, and safe and quiet government of the said Mystery or Art;" which bye-laws were to be observed so as they should not be repugnant nor contrary to the laws and statutes of the Kingdom of *England*, nor the provisions of the charter, nor to the custom of the City of *London*, nor the liberties, jurisdictions, or privileges of the Mayor and Commonalty and citizens of the said city. The writ further recited that the prosecutor was duly qualified to be and, on 20th *October*, 1849, was duly elected and admitted as an Assistant, and was afterwards by the defendants wrongfully removed.

The return, in substance, alleged that the charter was not fully or correctly set forth in the writ, and that it contained a provision that elections of Assistants contrary to the directions of the charter should be void. That the prosecutor was not duly qualified; was not duly elected, nominated, or constituted, an Assistant;

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that he had ill-conducted himself, and was not entitled to hold his office; that there was just cause for his removal; that he was not wrongfully removed or without just cause; that the Company has considerable property, real and personal, and the care and distribution of various charity and other estates; that the Wardens are elected annually by ballot from the Court of Assistants, and that, according to the usual course and routine, a person coming upon the Court would be elected to the offices, first, of Renter Warden, an officer who is treasurer of the Company and has the receipt of the rents and the charge and custody of those and other moneys and property of the Company, and performs the duties of the office in person; next, that of Quarter Warden, an officer who receives the quarterage, which he pays over to the Renter Warden; afterwards, that of Key Warden, who has the care of the common seal and archives; and, finally, that of Prime Warden and Master, who presides at meetings of the Court and has a casting vote: after which the member falls back into the Court. That the Assistants manage the affairs of the Company, and control the expenditure, and the grant of pensions and relief to decayed members, and have the general government of the Company and the trade; possessing and exercising, inter alia, a right of search for and seizure of deceitful wares. That the election of Assistants, in case of vacancy, is made from the Livery according to seniority. In cases of solvency and good character, the office is held for life; but, in case of misconduct causing unfitness, or other sufficient cause, or receiving parochial aid, or petitioning the Court for relief, the Assistant would no longer receive a summons to attend the Court. That, should an Assistant come to decay, and petition for relief

out of the Company's funds, he is considered, as a matter of course, to cease to be a member of the Court, upon receipt of his first quarter's pension, and the vacancy so caused is at once filled up, and the decayed member falls back into the livery; and that the same course has been pursued in the case of misconduct involving unfitness or incompetency. That, on 23rd *April*, 1799, a bye-law was made, in pursuance of the power in the charter, which bye-law has since remained in force, and is in these words:—"Resolved, that no person who has been a bankrupt or become otherwise insolvent, shall hereafter be admitted a member of the Court of Assistants of this Company, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the satisfaction of the Court, or the majority of them." That the prosecutor procured his election and admittance by fraudulently representing himself to be solvent, whereas he was in fact insolvent, and his creditors have never received payment, except of a dividend of 2*s.* 8*d.* in the pound, under his bankruptcy. That he afterwards, on 30th *November*, 1849, was adjudicated bankrupt in respect of a debt existing at the time of his false representation of solvency; which bankruptcy remains in force; and that he was, at a subsequent meeting of the Court, duly convened and held before the issuing of the mandamus, lawfully removed, and that for these reasons he ought not to be restored.

The prosecutor pleaded to this return two pleas. The first traversed the statement in the return, as to the letters

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patent being insufficiently set forth. It also alleged, in effect, that the prosecutor was duly qualified; duly elected; had not misconducted himself; was duly in and entitled to the office; that there was no just cause for his removal; that the removal was wrongful and without just cause; that no such bye-law was made or in force at the times when, &c.; that the prosecutor did not make the false and fraudulent statement alleged; that he was duly elected and admitted, and not through any fraud; that the meeting of the Court at which he was removed was not duly convened; and that he was not removed and did not cease to be, but at the time of teste of the writ was, and still is, an Assistant, and entitled to be admitted thereto. The second plea alleged, that the prosecutor was, at the time of the holding of the Court at which he was removed, an Assistant, and entitled to be summoned, but that he was not summoned thereto, and had not notice nor any opportunity of attending thereat.

Upon these pleas the defendants took issue.

It may have been observed that the return, in so far as it states the manner and routine in which the Wardens are elected, their duties with respect to the moneys of the Company, and the insolvency and bankruptcy of the prosecutor, is not traversed, and that those statements, if material, are admitted for the purposes of the cause.

At the trial a special verdict was found, the material points of which may be stated as follows. It finds the charter, a copy of which in the Latin is annexed, and also the bye-law in the terms stated in the return. It states that a person holding the office of Assistant "might, by reason of his being in such office, be elected to the office of Renter Warden, which last mentioned office was an office of trust, and the person for the time

being holding the said last mentioned office might, by virtue of such office, receive large sums of money belonging to the said Wardens, or Keepers, and Assistants, and which moneys had to be applied for charitable purposes and otherwise." It further appears, from the verdict, that the prosecutor was, on 23rd *April*, 1849, in due form elected an Assistant by a preliminary resolution, which was in due form confirmed on 25th *July* following. That, on 24th *September*, he made a representation to the clerk and agent of the Company that he was solvent: that, in consequence of such statement, he was, on 16th *October*, informed of his election, and summoned to attend a Court on the 20th of the same month, which he did accordingly, and was then sworn in and acted and received his fee as an Assistant; and that he was again summoned to attend, and attended, a Court on 6th *November*, when he also received his fee and acted as an Assistant. That, on the 30th of the same month, he was adjudicated bankrupt. That, on 20th *December*, at a meeting of Assistants held without any summons or notice to the prosecutor, or opportunity of his attending, but in other respects regular, he was expelled. As to the qualification of the prosecutor for the office, the verdict finds that, at the time of the first resolution for his election, and from thence virtually up to and at the time of his illegal removal, he was in insolvent circumstances and unable to pay his creditors 20s. in the pound, and, during all such time, the said *Kay Dinsdale* then owed large sums of money, on judgments and otherwise, to divers persons, which debts have always remained unpaid and unsatisfied; but he was, in other respects, duly qualified to be elected an Assistant. As to the alleged

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fraud, the verdict finds that the prosecutor did, after the passing of the resolution of 23rd *April*, but before it was communicated to him, to wit on 24th *September*, 1849, in answer to an inquiry which *Giles Clarke*, then being the agent in that behalf of the defendants, made of him as to his solvency, represent and state to the said *Giles Clarke*, then being the clerk and agent as aforesaid of the defendants, that he was then quite as solvent as any man of the Court, and able to pay his creditors 20*s.* in the pound, whereas, in truth, he then was, and thence hitherto has been, insolvent, and he was then largely indebted to divers persons in large sums of money, and was wholly unable to pay his creditors 20*s.* in the pound, as he then well knew, and the said creditors never were paid their said debts, or any part thereof, except a small dividend of 2*s.* 8*d.* in the pound, which, and no more, after great delay, was paid to the said creditors under the bankruptcy mentioned in the return ; and that, "by means of the said false and fraudulent representations, the said *Kay Dinsdale* induced and procured the said then Wardens, or Keepers, and Assistants, to admit him to the said office aforesaid." That the said *Giles Clarke*, as such clerk and agent as aforesaid, after the making of the said representations, and in consequence thereof, caused the prosecutor to be summoned to attend the meetings which it is alleged he attended, and caused the fact of the election to be communicated to him. That the said representations were not communicated by the said *Giles Clarke* to the Court of the Company until 20th *October*, 1849, which was the first Court held after they were made, and was the Court at which the prosecutor was admitted.

Upon this special verdict the Court of Queen's Bench

gave judgment for the prosecutor, and awarded a peremptory mandamus. The case was thereupon, by the proceeding substituted for a writ of error, brought into this Court, and it was argued before us at the Sittings after last Term, when we took time to consider.

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The first and great question is as to the validity of the bye-law. The objections made to it were, first, that it was beyond the powers of the Court of Assistants; secondly, that it was void, because of the provisions of stat. 19 H. 7. c. 7.; and lastly, that, if not, it was bad in form, as being directed against admittance only and not election.

The first objection, if valid, must be so either because of the bankruptcy or insolvency of a freeman being in itself an unreasonable ground of disqualification for the office of Assistant, or because of a violation of the charter in unduly limiting the class from whom the selection of Assistants is to be made. Upon full consideration, however, we are of opinion that the bankruptcy or insolvency does not constitute an unreasonable ground of disqualification for the office of Assistant. Not only is the office in itself one of trust and confidence, but it leads, almost as a matter of course, to the office of Renter Warden, the holder of which is the treasurer and keeps the purse; and it seems to us but reasonable that persons interested in the prosperity and honour of the Company should desire that the custody of its money should be not only trustworthy, but safe beyond the risk of temptation, and that the conduct of its affairs should not be in the hands of those who have shewn themselves to be presumably incompetent to the prudent management of their own. It is true that persons do sometimes become bankrupt and

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insolvent without misconduct, and even without imprudence, but the great mass of bankruptcy and insolvency is to be traced to one or other of these causes; and bye-laws must be considered as subject to the general maxim that laws ought to be adapted to meet cases of ordinary occurrence, and ought not to be pronounced bad because, in rare and exceptional instances, they may work a hardship.

With respect to the authorities cited on this point, they do not, in our opinion, touch it. That of *Rex v. The Mayor &c. of Liverpool* (a) arose upon the common law, and not upon a bye-law, which must necessarily superadd something to the common law, otherwise it would be idle. Indeed, bankruptcy was unknown to the common law, and is the creation of comparatively modern statutes. The other cases turned upon the construction of particular statutes relating, one of them to municipal corporations and the other to County Courts, and they have equally little application.

Next, as to the question whether the bye-law unduly restricts the eligible class, in violation of the provisions of the charter; we must observe that there is a distinction in this respect between bye-laws which exclude a class of persons from an office to which by the charter they are eligible, and those which only ascertain a criterion of fitness such as, having regard to the object of the charter, is a just and reasonable one. The former class is void, the latter valid; and it is within this class that the bye-law in question, in our opinion, falls. The law is, in this respect, correctly stated in Mr. *Frazer's* learned note to *The Case of Corporations* (b). See also *Green*

(a) 2 Burr. 723.

(b) 4 Rep. 78 a.

v. Mayor of Durham (a). The second objection, founded upon stat. 19 H. 7. c. 7., is disposed of by reference to the decisions upon the construction of that statute, stated in 2 *Kydd*, 108, from which it appears that, although a penalty may be incurred by the persons who make a bye-law without the approval therein directed to be obtained, yet the bye-law itself, made without such approval, is not invalid.

We proceed to consider whether the last objection, pointed to the form of the bye-law, is fatal. That objection is, that the bye-law professes to invalidate the admittance only, and therefore impliedly permits the election, by which it is alleged that the right to admittance is vested, and after which it is said that the admittance is merely ministerial. The whole weight of this argument rests upon the assumption that the bye-law uses the words "be admitted a member of the Court of Assistants" in the same restricted sense in which the phrase "ad executionem officii sui admittatur" is employed in the charter, as pointing to an admittance after an election. Now assuming, for argument's sake, that the bye-law, if so read, would be inoperative, as to which we give no opinion, still, the question whether it is to be so read depends upon whether any other reasonable construction can be put upon its language, so as to make it operative; and, if so, whether the Court ought to construe a bye-law like a plea in estoppel, or whether we ought not to put upon it such a construction as, if possible, to make it effectual. Now the bye-law is, certainly, capable of a different construction from that put upon it by the prosecutor's counsel; for, according

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(a) 1 *Burr.* 127; *S. C. Ld. Ken.* 512.

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to the ordinary use of language, a law that a person shall not "be admitted a member" means that he shall be excluded from becoming so by any of the means conducive thereto; whether by election, admittance after election, or otherwise. Indeed, when it is considered that, in this case, the functions of election and admittance are performed by the same body, it seems unreasonable to draw a distinction between a rejection thereby at the election, and a refusal thereby of admittance after election; both processes taken together constituting in fact the person's being admitted a member. It is sufficient, however, to say that the construction above suggested is one of which the bye-law is capable, and which it ought to receive, according to the familiar rule of construction that instruments should be so construed as that they may stand good, rather than be defeated. That this rule is applicable to bye-laws sufficiently appears from the case of *The Poulterers' Company v. Phillips* (a). The bye-law, read in the sense thus explained, and enforced, rendered invalid both the election and admittance of the prosecutor, by reason of his insolvency; and, if this were a proceeding against him by quo warranto, we must have given judgment for the Crown, by reason of such his disqualification. It was, however, agreed that the question raised by the present proceedings was different from that which would have arisen upon a quo warranto, because the prosecutor had actually been admitted and had seisin of the office before his removal; and that, inasmuch as the removal took place without his having an opportunity of being heard in his own defence, it was inoperative, and, so, that he is entitled to be restored;

(a) 6 Bing. N. C. 314.

and can only be removed, if at all, either by quo warranto, or by a regularly constituted meeting of the Court of Assistants, at which he may have an opportunity of being heard. We assent to this argument in so far as it asserts that the proceedings at the meeting of 20th *December* were inoperative to remove the prosecutor as for a corporate offence, adjudicated upon by dismissal, pursuant to the charter. We also think that the learned counsel for the prosecutor was well founded in his contention that a corporate offence not constituting a disqualification *de facto*, committed, after election, by a person otherwise well qualified, could not be relied upon in the return to a mandamus to restore, without shewing an expulsion, in consequence of such offence, after the prosecutor had had an opportunity of being heard. This is obviously reasonable, because the person accused might, if heard, put forward an excuse which the Court of Assistants, proceeding to consider the question, it may be less rigorously than would a strictly judicial tribunal, might in their judgment deem sufficient; or he might prove such circumstances as would induce them to overlook the offence and abstain from removing him. Such a course of reasoning is, however, inapplicable to a case like the present, in which the prosecutor appears to have been, from the beginning, disqualified by a bye-law, forming as much part of the constitution of the Company as does its charter, and where the Court of Assistants could not, consistently with their duty, waive that disqualification, or do otherwise than expel him. The distinction between such a case and that first put is obvious. It is also plainly distinguishable from that which arises where, upon a mandamus to elect, the Corporation

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returns that the office is already full, so as to put it upon the applicant to try the question in a proceeding against the person really interested. We should be very slow to allow the prerogative writ of mandamus to issue, ordering the restoration to office of a person not qualified to hold it, or to discharge its duties; who ought never to have been elected, and who never would have been elected but for a mistake of fact on the part of the electors. It might well be held, and not inconsistently with any authority cited, that the maxim "error facti non nocet" governs the case, and decides it in favour of the defendants. It is, however, unnecessary to dispose of the case on this ground, because the only circumstance which could be plausibly relied upon as making a proceeding by quo warranto necessary, was the admittance de facto; it being clear that the insufficiency of the election would be a good answer to a mandamus to admit, even if it be not so to a mandamus to restore: see *Rex v. Williams* (a). And in our opinion the argument for the defendants was successful to shew that any effect of the admittance in this case was defeated by the falsehood whereby it was obtained. To this argument several answers were put forward on the part of the prosecution. First, it was said that the misrepresentation was a mere falsehood as to something collateral or immaterial. This depends upon whether the bye-law was valid, and it is disposed of by our decision in the affirmative. In each of the cases referred to under this head, except *Stewart v. Aston* (b), the Court held that the misrepresentation was not of a fact "dantis causam contractui" but of collateral matter. In the case of *Stewart v. Aston* (b), the

(a) 8 B. & C. 681.

(b) 8 Irish C. L. Rep. 35.

marginal note of which is incorrect, a consideration had actually passed, and was retained by the defendant, so that he was not in a position to avoid the deed upon the ground of fraud; see *Clarke v. Dixon* (a). In the present case, as the bye-law was valid, the statement of solvency was relevant and material to the question of admittance, and was the direct cause and occasion thereof. Next, it was said, that the finding in the special verdict that the admittance was procured by means of a representation which the verdict designates as "false and fraudulent," ought not to be acted upon, because at the time of making it the prosecutor did not know of his election. To this, however, the answer is plain, that he knew he might be elected, and made the statement, knowing it to be false, to the agent of the electoral body; and that when that statement was reported to them at the Court of 20th December, where he was admitted, he accepted and acted upon the admittance, which, as he must then have known, proceeded upon the faith of his statement being true. These circumstances, simply, warrant the conclusion that he procured his admittance by falsehood and fraud. Lastly, it was argued that, even assuming the admittance to have been procured by fraud of the prosecutor, yet the office became vested in him, and could not be divested by reason of the fraud. For this proposition were cited the cases of *Feret v. Hill* (b), where the misrepresentation was held to be collateral and not to go to the root of the contract, and *Stewart v. Aston* (c), where, as already pointed out, it was impossible to place the parties in statu quo. In neither of

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(a) *E. B. & E.* 148.(b) 15 *C. B.* 207.(c) 8 *Irish C. L. Rep.* 35.

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those cases was it decided that fraud may not invalidate a transfer of land equally as one of goods, where the parties can be put in statu quo by simply avoiding the transaction, and the election to avoid it is made by the party defrauded within a reasonable time after the discovery of the fraud, and before a right has been created in any third party. And, in whatever manner the question thus stated ought to be decided, there is a wide difference between a conveyance of land which by the policy of the law must be vested in some one, and the creation of a personal right incapable of transfer, such as the office of Assistant. A much closer analogy is found in the case of judgments and other proceedings in Courts of justice, obtained by fraud upon the Court. These might be treated as void in a collateral proceeding without any writ of deceit, where that process existed, and without any application to the Court to set them aside. Instances of this will be found, as to a fine, in *Fermor's Case* (a); as to a judgment, in *Philipson v. Lord Egremont* (b); and as to a decree, in *Earl of Bandon v. Becher* (c).

We are therefore of opinion that the objection as to the effect of the admittance is not open to the prosecutor; and in so deciding we act upon the plain principle that "it is not reasonable that one should take advantage of his own wrong, and if the law should give him such power the law would be the cause and occasion of wrong" (d).

We have thus disposed of all the questions affecting the merits of the case; and it only remains for us to

(a) 3 Rep. 77 a.

(c) 3 Cl. & F. 479.

(b) 6 Q. B. 587.

(d) 5 Rep. 30 b.

direct how the verdict should be entered upon the issues in point of form.

It is right here to notice that the special verdict is drawn in the old form, with much unnecessary prolixity, instead of in a simple and more compendious form, after finding the facts, stating that the jury are ignorant how, upon such facts, the issues ought to be found; praying the advice of the Court; and stating that they find according to its judgment: or, if it be desired to narrow the question for the opinion of the Court, the form adopted in *Mowatt v. Lord Londesborough* (a) may be resorted to. We impute no blame to the gentlemen who prepared the special verdict in the present form, for which there are no doubt numerous precedents; but we trust that in future a shorter form will be adopted in practice. As to the first plea, the substantial part of it must, according to our judgment, be found for the defendants. The traverse as to the charter being insufficiently set out in the mandamus ought to be treated as a distinct issue in denial of the charter alleged, and found for the prosecutor. So ought the traverse as to the prosecutor having been duly elected, because, upon these pleadings, the issue as to the election is simply whether it was done in point of form; the due qualification of the prosecutor being the subject of distinct averment in the mandamus, return and plea. We must for this purpose treat the issue as divisible, for the second Common Law Procedure Act puts the pleadings in mandamus, after the return, upon the same footing as those in an ordinary action. As to the residue of the first plea, the judgment of *Lord Wensleydale* in *Lush v. Russell* (b)

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(a) 4 E. & B. 1.

(b) 5 Exch. 203.

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question, the finding must be for the defendants.

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As to the second plea, it is either sustainable, in point of law, on the ground that the averment, that the prosecutor was an Assistant, and entitled to attend the meeting of 20th *December*, is an implied traverse of that part of the return which we have held to be an answer to the mandamus; and, as that averment is disproved, the plea fails; or, if that averment is not to be so construed, the plea is insufficient in point of law, and then, in order to entitle the prosecutor to a verdict thereupon, it was necessary to prove all the averments. In either view, the verdict upon that issue must be for the defendants.

The result is, that we reverse the judgment of the Queen's Bench and give judgment for the defendants.

Judgment reversed.

The judgment of the Court of Queen's Bench was affirmed, and that of the Exchequer Chamber was reversed, in the House of Lords, on 28th *July*, 1863.

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The Overseers of the Poor of the Parish of St. *Wednesday,*
 BOTOLPH WITHOUT ALDGATE, appellants, *June 8th.* *against* *Saturday,*
 the Board of Works for the WHITECHAPEL *June 9th.*
 District, respondents.

CASE stated by a Metropolitan Police Magistrate, By The Me-
 under stat. 20 & 21 *Vict. c. 43.* tropolis Man-
 agement Act,
 1855, 18 & 19
Vict. c. 120.

On 17th *February*, 1858, the said overseers, the appel-
 lants, were summoned to appear on 24th *February*, 1858,
 before the magistrate, at the Police Court, *Arbour Square*,
 in the county of *Middlesex*, and within the Metropolitan
 Police District: For that the Board of Works for the
Whitechapel district, by an order under their seal, bearing
 date 2nd *March*, 1857, directed to *Henry Grant Baker*
 and *Charles McLachlan*, did require them, as the over-

s. 158., every
metropolitan
District Board
is, by order
under its seal,
to require the
overseers of
the several
parishes in
the district to
levy and pay
over to the
Board the
sums which
it requires for

defraying the expenses of the execution of the Act; distinguishing, in such order, the sums required for sewerage expenses from those required for other expenses under the Act. By sect. 159, if it appears to the Board that all or part of the expenses for defraying which the order is made have been incurred for the special benefit of part, or not for the equal benefit of the whole, of the district, the order may direct the sums, or part of them, required to be levied, to be levied in the part of the district specially benefited, or may exempt any part of the district from the levy, or require a less rate to be levied thereon, as the circumstances may require; and if in the judgment of the Board an entire parish is entitled to exemption, no order need be made on such parish.

Held, that the effect of the Act is to substitute districts for the parishes of which they are composed, for all purposes of management, taxation and expenditure; not for purposes of management only. That the rates leviable in the component parishes under the orders of a District Board, are raised for the benefit of the whole district, though apportioned between the parishes. That, *prima facie*, the rates ought to be apportioned between the parishes according to their respective rateable value, and not according to the outlay in them respectively; subject to allowances, at the discretion of the Board, in cases falling within sect. 159. That an order of a District Board on a parish, distinguishing between the sums required for sewerage and for other expenses, is good under sect. 158, and is final, if made by the Board after an impartial exercise of the discretion given to it by sect. 159; the decision of the Board, so arrived at, as to the amount proper to be required from a parish, being, even if erroneous, conclusive.

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seers of the parish of *St. Botolph without Aldgate*, in the county of *Middlesex*, to levy and pay over to the treasurer of the said Board the sum of 564*l.* 1*s.*, upon the days and by the instalments therein mentioned. And for that default had been made in payment of the said several sums in manner directed by such order.

The said complaint was made under the provisions of stat. 18 & 19 *Vict. c.* 120. [The case then set out a copy of the order of 2nd *March*, 1857; which contained a notice that the sum of 141*l.* 0*s.* 3*d.*, part of the said sum of 564*l.* 1*s.*, was required for defraying expenses of constructing, altering, maintaining and cleansing the sewers, or otherwise connected with sewerage within the said district; and that the sum of 423*l.* 0*s.* 9*d.*, the remaining part of the said sum of 564*l.* 1*s.*, was required for defraying other expenses of the execution of the said Act within the said district. The order also contained the following note. "The overseers, having levied the amount of the above order in the manner directed by the 161st section of stat. 18 & 19 *Vict. c.* 120., are required by the same section to pay to the treasurer of the Board, or otherwise as in such order directed, the amount mentioned in the order, within the time or respective times specified for that purpose, and the excess, if any, which may have been levied beyond such amount; which excess shall be placed to the credit of the parish or part in which the same has been levied."] It was proved before the magistrate that the said order had been made in conformity with certain resolutions passed by the said Board of Works on 4th *August*, 1856, 23rd *February*, 1857, and 2nd *March*, 1857. Considerable discussion had, from time to time, taken place, at the said Board of Works, as to the principle to be adopted in

determining the contributions to be paid by the various parishes and places within the district. At a meeting of the Board on 4th *August*, 1856, it was resolved, "That the expense of keeping the pavement in repair, and every other expense, ought to be charged in the same manner on each parish, in proportion to its rateable value ; but that, as some portions of the district were not paved at all, and other portions were very insufficiently paved, the expense of bringing the paving of those portions of the district into as good a condition as the well paved portions of the district ought to be borne by the parishes in which those unpaved or insufficiently paved portions were situate." At a meeting of the Board on 23rd *February*, 1857, it was resolved, " That the recommendation of the Finance Committee, as to a call to be made upon the several parishes and places within the district, be approved and adopted." The call upon *Whitechapel* was for the sum of 2225*l.* for a general rate, and for the sum of 456*l.* 11*s.* 9*d.* for a sewers' rate. At a meeting of the Board on 2nd *March*, 1857, the clerk laid before the Board the several contribution orders directed to the overseers of the several parishes within the district, which had been prepared by him for the several amounts determined upon at the last meeting of the Board, and which, upon reference to the minutes of the last mentioned meeting, were found to be correct. It was then resolved, " That the common seal of the Board be affixed to such several contribution orders, and that Messrs. *Soper* and *Freeman* be the members of the Board, in addition to the Chairman, to attest the affixing of the seal of the Board thereto." The common seal of the Board was then affixed to such several orders, and the affixing of the seal was attested by the Chair-

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man, by Messrs. *Soper* and *Freeman* and by the clerk. The above sum of 2225*L*., charged to the parish of *Whitechapel* under the general rate, is composed of its share of the call, according to rateable value, and of a sum of 855*L*. 4*s*. 9*d*., being a sum required for special paving, chargeable exclusively on *Whitechapel*, according to the aforesaid resolution of 4th *August*, 1856. The other sums mentioned in the recommendation of the Finance Committee, with the exception of 285*L*. for bond debt and interest charged exclusively upon the parish of *The Holy Trinity, Minorics*, represent the shares of the call, according to rateable value, payable by each parish in the district. Prior to and at the time of passing of The Metropolis Management Act, 1855, the said parish of *St. Botolph without Aldgate* had been and was separately rated for drainage, paving, cleansing, lighting and other purposes named in the said Act for the better local management of the Metropolis, except sewerage; and the affairs of the said parish in respect of those matters were managed under and by virtue of the provisions of a local Act of Parliament, 47 *G. 3. c. xxxviii. (a)*, intituled "An Act for more effectually paving the streets, and other places, within that part of the parish of *St. Botolph Aldgate*, which lies in the county of *Middlesex*, and part of a street called *East Smithfield*, in the precinct of *Saint Catherine*, and for cleansing, lighting, and watching the same, and for preventing annoyances therein." (This Act was to be taken as part of the case.) If each parish in the *Whitechapel* district had been required to contribute to the sewers' rate and the general rate for the district, upon the principle of apportioning the whole amount of those

(a) Local and personal, public.

rates among the several parishes in the district, according to the outlay for those purposes respectively, or according to the benefit directly derived by such parishes respectively therefrom, and not, as was done, upon the principle of requiring each parish to contribute according to its rateable value only, then the sum to be contributed by the parish of *St. Botolph without Aldgate*, both as regarded the sewers' rate and the general rate, would have been considerably less than the sum which, by the said order of 2nd *March*, 1857, the said parish was required to contribute towards the said rates respectively.

Upon this state of facts the overseers contended that the order of 2nd *March*, 1857, was made upon an erroneous principle, both as regarded the sum to be contributed for sewers' rate, and the sum to be contributed for general rate, and that it was null and void. On the other hand, the Board contended that the order was made upon a correct principle, and also that they had determined the proportion of benefit according to their discretion, and that their decision was conclusive.

The magistrate, being of opinion that the said order was a good and valid order, as regarded both the said rates, gave judgment for the complainants, and ordered his warrant to issue for levying the amount mentioned in the said order, by distress and sale of the goods of the said overseers.

The question for the opinion of the Court was, Whether the said order of 2nd *March*, 1857, was a valid order: it being admitted that, if the order was valid, the magistrate was right in directing a warrant to be issued as aforesaid. And it was agreed that no technical objections were to be taken on either side, but the case was to be decided on the merits.

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Sir *Richard Bethell*, Attorney General, for the respondents. The order of 2nd *March*, 1857, was good and valid. It was one object of The Metropolis Management Act, 1855, 18 & 19 *Vict. c. 120.*, by dividing the Metropolis into districts, each including several parishes, to put an end to the old system of parochial government, and to secure the benefits derivable from the imposition of rates on wider areas than mere separate parishes. The Board constituted for any such district has, under the Act, to determine what amount is required to be levied for the general expenditure of the district; and that amount is to be charged upon the several parishes constituting the district, in proportions to be determined, not by the outlay in each, but by the aggregate rateable value of the property in each. There is nothing in the Act to shew that the criterion of outlay or direct benefit is to be adopted in determining the rateability of each parish. For rating purposes, the whole district is to be treated as though it were a single parish; through all the parts of which a parochial rate would be equally distributed. The question turns upon the proper construction of sects. 158 and 159. Sect. 158 enacts that "Every vestry and district board shall from time to time, by order under their seal, require the overseers of their parish, or of the several parishes in their district, to levy, and to pay over to the treasurer of such vestry or board, or into any bank in such order mentioned, and within the time or times thereby limited, the sums which such vestry or board may require for defraying the expenses of the execution of this Act (and such orders may be made wholly or in part in respect of expenses already incurred, or of expenses to be thereafter incurred); and every such vestry and board shall distinguish in their orders sums required

for defraying expenses of constructing, altering, maintaining, and cleansing the sewers, or otherwise connected with sewerage, and also, where" stat. 3 & 4 *W. 4. c. 90.* "or any other Act by virtue whereof land is rated in respect of expenses of lighting at a less amount in proportion to the value thereof than houses, or is wholly exempted from being rated in respect of such expenses, is in force in any parish, or any part of any parish, at the time of the passing of this Act, distinguish, as regards such parish, or part, the sums required for defraying expenses of lighting their parish or district, from sums required for defraying other expenses of executing this Act; but every such vestry and board may cause to be raised as expenses connected with sewerage such portion of the expenses incident to the conduct of their business in relation to sewerage, in common with the conduct of their other business under this Act, as to such vestry and board may seem just; and the overseers or collectors, in the receipts to be given for the sums levied or collected by them, shall distinguish the rate in the pound required for sewerage expenses, and the rate required for the other expenses of this Act." And sect. 159 enacts, that "where it appears to any vestry or district board that all or any part of the expenses, for defraying which any sum is by such vestry or board ordered to be levied as aforesaid, have or has been incurred for the special benefit of any part of their parish or district, or otherwise have or has not been incurred for the equal benefit of the whole of their parish or district, such vestry or board may, by any such order, direct the sum or sums necessary for defraying such expenses, or any part thereof, to be levied in such part, or exempt any part of such parish or district from the levy, or require a less rate to be

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levied thereon, as the circumstances of the case may require; and any such board may refrain, where any entire parish ought in their judgment to be so exempt, from issuing an order for levying any money thereon, notwithstanding they may issue an order or orders for levying sums upon any other parish or parishes in their district." The order in dispute is framed in strict compliance with the 158th section, distinguishing between the sums required for sewerage expenses, and those required for other expenses. Sect. 159 gives the Board a discretion to exempt unbenefited portions of the district from the levy, or to reduce the amount of the levy in partially benefited portions. And the Court can see, from the facts stated in the case as to the discussions at the several meetings of the respondents therein referred to, that the respondents have exercised their discretion in this respect, after taking all the circumstances into consideration. That being so, the Court will not interfere with the result. The opposition to the determination of the Board is, in reality, confined to *The St. Katherine Docks Company*. Those docks are, it may be, considerably benefited by the expenditure of the rates. But they increase considerably the traffic all round them, and impose a great amount of wear and tear on the neighbouring streets and roads. This fact is an illustration of the good sense and wisdom of the Legislature in dividing the metropolitan rateable areas into large districts. Had the Board declined to exercise its statutory discretion, the Court might have ordered them to do so; but no ground exists for the Court's interference with the discretion when exercised.

Sir Fitzroy Kelly, contra. The Metropolis Manage-

ment Act, 1855, has done no more than transfer the management of the metropolitan parishes from the parochial authorities to the District Boards; it gives those Boards no power to substitute new modes of rating the parishes for those which formerly prevailed. Under the old system, the overseers of each parish had to inquire what sums were wanted for paving, lighting and sewerage in the parish; and those sums, and no more, were levied from the parish. The question is, whether the mere aggregation of the parishes into districts is to alter the law in this respect, so as to make one parish rateable for the paving, for instance, required in another. The answer is, that the law remains as it was before, and that the only alteration is in the managing body for each parish. Were it otherwise, there would be no guarantee that all the parishes would be fairly dealt with: some one parish might preponderate at the Board to the prejudice of the rest. Again, to hold that, with regard to the expenses of sewers, in particular, a parish which derives no benefit from the sewers in another may be charged with the maintenance of the latter, would be to repeal the old-established principle of the law of sewers, that property is rateable to sewers' rate according to the benefit derived by such property from the sewers; *Dore v. Gray* (a), *Masters v. Scroggs* (b), *Rex v. Commissioners of Sewers for the Tower Hamlets* (c). *Metropolitan Board of Works v. Vauxhall Bridge Company* (d) decides that The Metropolitan Sewers Act, 1843, 11 & 12 Vict. c. 112., did not alter the ancient principle of rating; Lord Campbell C. J., in delivering the judgment of the Court, saying "Primâ facie, assessments under a

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(a) 2 T. R. 358.

(b) 3 M. & S. 447.

(c) 9 B. & C. 517.

(d) 7 E. & B. 954.

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sewers' rate must have regard to the benefit which the property derives from the sewers, and property which derives no benefit from the sewers is not liable to be assessed. The onus, therefore, lies upon the party who alleges that a different principle has been adopted by the Legislature." Sect. 164 of the present Act preserves the exemption from sewers' rate of property which was exempt therefrom at the time of the coming into operation of stat. 11 & 12 Vict. c. 112. And sect. 170 requires the Metropolitan Board of Works, in assessing the different parts of the Metropolis to the expenses of the Board, to have regard, "in the case of expenditure on works of drainage, to the benefit derived from such expenditure by the several parts of the Metropolis affected thereby." Beneficial occupation is in all cases the test of rateability; *Hackney and Lamberhurst Tithe Commutation Rent Charges* (a). Moreover, if the Board require the whole of the rates, whether for sewerage or other purposes, to be levied on the parishes according to their rateable value, they do not preserve the distinction between rateable value for sewers' rate and for poor rate. By that means two parishes may be rated, under an order of the Board, for nearly the same amount of sewers' rate, although the rateable value of one of them for that purpose falls far short of that of the other.

Sir *Richard Bethell*, Attorney General, in reply. The argument on the other side is virtually restricted to an objection to the taking, by the respondents, from any one parish, an amount of sewers' rate greater than the outlay in that parish for sewers. But whatever may have been the law under the old system,

(a) *E. B. & E. 1.*

the simple question now is, whether the amount required, under The Metropolis Management Act, 1855, for sewers' rate, is not a portion of the sum required for defraying the expenses of the execution of the Act. The whole scope of the Act shews that it is so, although sect. 158 requires the sewers' rate to be kept distinct. The district, the aggregate of the parishes composing it, is, by the Act, substituted for the single parishes for all purposes of the Act; and the sewers' rate leviable under the Act is rather the total of the items of a great variety of miscellaneous expenses, for the first time authorized by the Act and directed to be classed together under that name, than a sewers' rate strictly so called. It is probable that great part of the very rate now in dispute was expended upon the general purposes of the Act, with a view to the benefit, not of any particular parish, but of the district at large. The exemptions from sewers' rate preserved by sect. 164 refer to the exemption of particular land situate in the different parishes, not to exemptions of the parishes as between themselves. [*Cockburn C. J.* The exemptions go to reduce the rateable value of each parish as a whole.] They have nothing to do with the distribution of the sewerage expenses between the different parishes. If, as the appellants here do not deny, a malcontent parish receives some benefit from the rate imposed for the general benefit of all, the principles laid down in *Dorling v. Epsom Local Board of Health* (a) shew that such a parish cannot object to its assessment to the rate. There is nothing in the present case to shew that all proper calculations were not made by the respondents

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(a) 5 E. & B. 471.

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before they, in the exercise of their discretion, determined the amount assessable upon the appellants; and upon the principle that *omnia præsumentur rite esse acta*, this Court cannot rectify any mistake which may have occurred in the assessment.



COCKBURN C. J. I am of opinion that the decision of the magistrate, upon which this appeal is brought, was right and ought to be affirmed. The appellants contend that, although the parishes subject to The Metropolis Management Act, 1855, have by that Act been united into aggregates called districts, nevertheless the expenditure incurred by a District Board is to be so apportioned as that each parish in the district shall contribute the amount, only, of the outlay which takes place within its own limits. This contention is, in fact, that the purpose and effect of the Act were simply to substitute district for parochial management, but not district for parochial expenditure and taxation. I think, however, that the object of the Act was to effect both these substitutions. It unites the various parishes into districts, in each of which a Board is to be created by election and representation, to do that which was formerly done by various local bodies, Commissioners, parish officers, and others appointed under a variety of Acts of Parliament. The expenses of executing the powers with reference to paving, lighting, watering, sewerage and other matters, conferred by the Act upon these Boards, are, by the 158th section, to be levied by each Board upon its district, by means of orders directed to the different parishes of which the district is composed, and of which the Board is, for these purposes, the governing body. Now, had the

Legislature intended that each parish should contribute to these expenses in respect only of the outlay in each, I think that very different language would have been used in the 158th section. That section provides that the district Board shall, from time to time, by order under their seal, require the overseers of the several parishes in their district, to levy and pay over to the treasurer of the Board the sums which the Board may require for defraying the expenses of the execution of the Act. This language being quite general, and no reference being made to the amount of outlay which may be incurred in each parish, I think that it is clear, upon the whole, that the intention was that the rate to be levied should be a general rate throughout the district, to meet the expenditure incurred for the district at large. Then, in order to avoid any injustice which might be thereby sometimes occasioned to particular parts of the district, sect. 159, which follows, provides that, where it appears to any district Board that all or any part of the expenses to meet which the rate is ordered to be levied have or has been incurred for the special benefit of any particular part, or otherwise not for the equal benefit of the whole, of the district, the Board may throw the burden upon the parts specially benefited, and may exempt other parts altogether or diminish the amount required from them, even where the part thought entitled to exemption is an entire parish. This section leaves it to the Board to take questions of the exemption or relief of parts of the district from the rate into consideration, and shews that it is for the Board to decide them, in the exercise of its discretion. That being so, this Court cannot consider whether the Board has exercised the discretion, so vested in it, rightly or wrongly. All that we can do is

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1860. to satisfy ourselves that the discretion has in fact been exercised: for, if the Board refused to exercise it, we might interpose to compel them to do so; but that is the extent to which, alone, we could interfere. It is true, as Sir *Fitzroy Kelly* pointed out in the course of the argument, that instances may occasionally occur in which injustice may be done by the preponderance of some one parish in the district over others, enabling it to influence unfairly the votes and decisions of the Board. That, however, was a matter for the Legislature to take into consideration when forming the various districts; and cannot affect the construction proper to be put upon the Act, which, indeed, the Legislature must not be supposed to have passed without due previous consideration. The only difficulty which I have felt arose upon the question of the sewerage expenses: and has been completely set at rest by the lucid argument of the Attorney General on this point. Powers relating to sewerage are amongst the powers conferred on the District Boards by the Act. They are not distinguished from the other powers; nor is separate taxation to be levied to defray their execution, save in so far as sect. 158 provides that a distinction is to be made, in the orders of the Boards, between the sums required for expenses of sewerage and those required for other expenses. Sir *Fitzroy Kelly* suggested that this provision was in accordance with the ancient principle of law relating to sewers' rate, that such property, only, is amenable to it as benefits by the sewers. And he cited, in support of his argument, sect. 164, which preserves the exemption from sewers' rate of land theretofore exempt. It is clear, however, that that section operates merely as a direction to the overseers what property in their respective parishes to exempt

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from the rate; and that it has no reference to the distribution by the Board, between the component parishes of the district, of the sums to be levied for the purposes of the Act. It was urged upon us, with much force, that, if the taxation authorized by the Act is to be levied indiscriminately upon the rateable value of the property in the different parishes, two neighbouring parishes may be assessed to sewers' rate on the footing of their rateable value to poor rate; although the rateable value of one of them to sewers' rate may be far less than that of the other, however much the two are on an equality in respect of rateability to the poor rate. It may be that it would be the duty of the Board, in such a case, to take that circumstance into consideration in making an order for the apportionment of sewerage expenses between those parishes, and not, in so doing, to be guided merely by the rateable value of the property in them, respectively, liable to the poor rate. But there is nothing before us to shew that this, if necessary, was not done in the present case. It being admitted, therefore, that sewerage expenses come under the head of the expenses to be defrayed as provided by the 158th section, the only objection made to the order of the Board seems to be that, in distributing among the constituent parishes the sums required to be levied for the common purposes of the district, they have not taken into consideration the amount of the outlay in each separate parish. It appears to me, however, that they were not bound to do so by the Act, which has altogether superseded the old parochial system, and to the provisions of which, alone, we must have regard. In my opinion the Board have acted in conformity with the expressed intention of the Legislature; and the magistrate was right in coming to that conclusion.

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1860. **WIGHTMAN J.** I was obliged to leave the Court before the conclusion of Sir *Fitzroy Kelly's* argument. I therefore take no part in the judgment beyond saying that, as far as I have considered the question, I am of the same opinion as the rest of the Court.

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CROMPTON J. I am of the same opinion. We are bound to say that the magistrate has not acted improperly, unless we can see quite clearly that the rate complained of was invalid. That, however, does not in any way appear. The main question between the parties is, whether, upon the general construction of The Metropolis Management Act, 1855, the Legislature has substituted district management for parochial, both as regards management and as regards taxation and expenditure, or as regards management only. I have felt satisfied, from the outset of the case, that the intention of the Legislature was to substitute the district for the parish in every respect; not to keep the parishes distinct for purposes of taxation and expenditure, though putting them under new management. In my opinion, therefore, the rate in dispute was a district tax. It is said that it ought to be distributed among the parishes composing the district, according to the outlay in each. The Act, it is true, lays down no precise principle by which the distribution is to be regulated. My own opinion, however, is that the Legislature intended to leave the principle of distribution very much to the discretion of each Board. It is clear, at all events, that the principle of direct benefit is not that to be applied; the rate is a district rate, and is to be levied for defraying the expenses of the execution of the Act in the district. Nor can the ancient principle with respect to sewers' rates, that they are leviable on such property only as is

directly benefited, apply here. A rate levied for defraying what are called sewerage expenses, under an Act of Parliament of the kind before us, is a very different thing from a sewers' rate strictly so called, and the indirect benefit arising to a parish in the district from that expenditure may be very much greater than that which is direct. The question, then, comes to this, whether the Board, in distributing the rate among their constituent parishes, have complied with the general directions of the statute. The Act does not in terms state how the Board are to proceed. I think, however, that the method adopted by the Board, in distributing the rate according to the rateable value of each parish, was a fair one. It may be that, in determining the rateable value of each parish, they ought to take into account the exemptions in favour of certain descriptions of property, contained in sects. 163, 164 and 165 of the Act; but it does not appear that there is any such property in the appellants' parish, or that, if there is, the Board have not taken that fact into account. Nor is it shewn that the Board have acted improperly in any way. By sects. 158 and 159 the Legislature have left it to the Board to look at all the circumstances and exercise their discretion thereon; considering, amongst other things, whether or not the principle of direct benefit is to be in any way acted upon. No discretion in the matter is given either to the magistrate or to this Court. Even if the Board have not taken all the circumstances into consideration, I think that we cannot interfere if they have exercised their discretion. In the present case they have done so, and it does not appear that they have passed over any matter which they ought to have entertained. Had an application been made to them to

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relieve from liability a particular part of the district, claiming to be entitled to the benefit of the 159th section, and had they wholly refused to listen to it, we could have interposed to make them consider it. But we have no jurisdiction to interfere with the result at which they, after consideration of all the circumstances, have arrived.

BLACKBURN J. I am of the same opinion. We have no jurisdiction to do more than consider the question submitted to us by the magistrate, namely, whether the order of the Board of 2nd *March*, 1857, was valid. It is said that this order was invalid on the ground that it proceeded upon an erroneous principle of apportionment of expenses between the different parishes in the district; and that less ought to have been apportioned to the appellant parish and more to others. But I think that, even if that were so, the order would not thereby be invalidated. The effect of sects. 158 and 159 of the Act is that all the expenses together constitute one fund of district expenses; and the Attorney General is quite right in saying that the whole amount is to be levied on the whole district, though apportionable among the constituent parishes, in the manner provided by those sections. Sect. 158 says that the Board is to make orders on the parishes to levy the sums required by the Board for defraying the expenses of the execution of the Act. This section is silent as to the principle on which the sums are to be apportioned between the parishes; and, had the Act contained no further provision on the subject, I should have thought that the proper principle would be to divide the sums equally and rateably among the parishes, according to their respective rateable value. But sect. 159 follows, and gives the Board jurisdiction to take into

consideration the fact of the expenses, in whole or in part, having been incurred for the special benefit of part of the district, or not for the equal benefit of the whole district, and thereupon to levy the expenses, or any part, in the part of the district specially benefited, or to exempt any part of the district from the levy, or require a less rate to be levied thereon, as the circumstances of the case may require. Now, here, the Board has taken these circumstances into consideration, and has thereupon made an apportionment of the expenses. Sir *Fitzroy Kelly* says that, in so doing, they have not made certain allowances which they ought to have made. I do not think, however, that we can enter into that inquiry. The Legislature has not provided for an appeal from the exercise by the Board of their discretion, and we must assume that the discretion has been duly and properly exercised. Otherwise, the absurd consequence would follow, that an error by the Board in the principle of apportionment, however slight and trivial, would invalidate their order and make the entire rate levied thereunder void. That would be a most unreasonable construction to put upon the Act. It is clear to me that the intention of the Legislature was to give jurisdiction to finally determine the apportionment of the expenses to the Board, the local Parliament, which, it was assumed, would keep equality and fairness in view: equality, that is, as to the general principle, and fairness as to the mode of carrying it out in cases where allowances ought properly to be made. The whole matter is confided to the discretion of the Board, without appeal, and without a reservation of power to any other tribunal to review their decision.

Judgment for the respondents.

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Wednesday,
May 30th.
Saturday,
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Monday,
June 11th.

The QUEEN, on the prosecution of the Governor and Company of the CHELSEA WATERWORKS, appellants, *against* The Overseers of SAINT MARY, PUTNEY, SURREY, respondents.

The pipes and reservoirs of a Waterworks Company were so placed in the several parishes in which they were respectively situate, that the whole together formed one apparatus for the supply of water, in some only of such parishes, to the customers of the Company; a part of such apparatus being rateable to the poor rate in each parish.

Held, that it was not a correct principle, in order to ascertain the rateable value of the apparatus in any one particular parish, to calculate the total rateable value of the whole apparatus in all the parishes, and then divide that value among the several parishes, according to the quantity of land occupied by the apparatus in each of them.

UPON an appeal to the *Surrey* Quarter Sessions by *The Chelsea Waterworks Company* against a rate for the relief of the poor of the parish of *Saint Mary, Putney*, by which the appellants were assessed at the net annual value of 8000*l.*, the appeal was, by consent, allowed, and the assessment was reduced to 3000*l.*, subject to the following case for the opinion of this Court.

The appellants are the Company mentioned in and continued incorporated by "The *Chelsea Waterworks Act 1852*" (a). The respondents are the churchwardens and overseers of the poor of the parish of *Putney*, in the county of *Surrey*. The Company sell water to the inhabitants of a certain district within which they are empowered so to do by virtue of the above mentioned Act. This district is situate wholly within the county of *Middlesex*. The Company have no power to sell and do not sell any water to any person or persons or for any purpose within the parish of *Putney*, or within the

(a) Stat. 15 & 16 *Vict.* c. clvi., local and personal, public. "For extending the *Chelsea Waterworks*, and for better supplying the city of *Westminster* and parts adjacent with water."

county of *Surrey*. The water sold as above mentioned is obtained in the following manner. A part of it is drawn off from the river *Thames* at *Seething Wells*, in the parish of *Kingston*, in *Surrey*, into reservoirs and filtering beds in the said parish of *Kingston*; and it is then, by means of pumping engines situated in the same parish, forced and conveyed through pipes, which are laid down in the parish of *Kingston* and other parishes in *Surrey*, including the parish of *Putney*, from the said reservoirs and filtering beds in the parish of *Kingston* into certain covered reservoirs in the parish of *Putney*. From these last mentioned reservoirs the water passes through other pipes, which are laid down in the parish of *Putney*, to the banks of the river *Thames*, over which it is conducted by pipes, which form an aqueduct across the river from the parish of *Putney* to the parish of *Fulham*; and thence the water is conveyed, by means of other pipes, into the Company's district in *Middlesex*, where it is supplied to the Company's consumers. The residue of the water so sold by the Company, as aforesaid, is taken from the same part of the river *Thames*, at *Seething Wells*. It is forced by the before mentioned pumping engines through another set of pipes laid down in the said parish of *Kingston*, and in other parishes in *Surrey*, including the parish of *Putney*, into an open reservoir in the parish of *Putney*; and thence it is conveyed, by means of other pipes in the parish of *Putney* and the before mentioned aqueduct across the *Thames*, into the parish of *Fulham*, and thence, by means of other pipes, into the Company's district, where it is delivered for the purpose of street watering. It is essential, for the purpose of supplying the water in the Company's district, either that it should be collected in and passed through the before mentioned reservoirs in

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the parish of *Putney*, or else that some other contrivance should be resorted to for the purpose of keeping the water at a sufficiently high level to admit of its flowing to the highest part of the Company's district. It is intended that the water should always be collected into and passed through the said reservoirs. The reservoirs, filtering beds and engines, in the parish of *Kingston*, the reservoirs in the parish of *Putney*, and the pipes in the several parishes, as used by the Company, form an apparatus by which water is drawn from the *Thames* at *Seething Wells*, and collected, conveyed, sold and distributed as above mentioned. The portion of the apparatus which is situate in the parish of *Putney* occupies nine acres of land, and consists of, first, certain pipes, occupying two acres, three roods and thirty perches of land, by means of which the water, after being passed through the Company's mains in the parish of *Kingston*, is conducted continuously into one or other of the said reservoirs in the parish of *Putney*; secondly, certain reservoirs occupying five acres and one rood of land; thirdly, certain other pipes, occupying one acre of land, by means of which the water is conveyed from the said reservoirs to the banks of the *Thames*; fourthly, certain other pipes, which occupy the remainder of the said nine acres of land, and which form that portion of the said aqueduct across the *Thames* which lies in the parish of *Putney*, the remainder of the aqueduct being in the parish of *Fulham*. The whole apparatus is so constructed and placed in the several parishes in which it is situate that a part is rateable in each parish; each and every part of the apparatus, as the same is constructed, and each and every part of the land occupied by it, is necessarily used and occupied for the purpose of supplying water

to the Company's customers, as before mentioned; and none of the water supplied by the Company to its customers can be supplied without the aid of every part of their said apparatus. The profits of the Company are derived exclusively from the sale of the said water to its consumers in the Company's said district. The rateable value, according to The Parochial Assessment Act, of the whole apparatus of the Company, in the several parishes in which it is situated was, for the purposes of the case, to be taken to be a certain sum which had been agreed upon between the parties, the same being calculated at the rate of so much per acre for all the land occupied by the apparatus. The charges and deductions which had been taken into account in making the estimate were those which are specified in The Parochial Assessment Act, and there were no special circumstances affecting the portion of the apparatus which is in the parish of *Putney*. It was to be assumed, for the purposes of the case, that the rateable value of the portion of the Company's apparatus which is within the parish of *Putney* had been ascertained by first taking the rateable value of the whole apparatus in the several parishes in which it is situated, then subdividing the amount among the said several parishes according to the quantity of land occupied by the apparatus in each parish. If that principle be correct, the rate was, by agreement, to be amended, and was to stand for the sum of 2800*l*. If that principle be not correct, then the rate was, by agreement, to be amended, and to stand for the sum of 2000*l*.

The question, therefore, for the opinion of the Court was, Whether the rate, when amended, ought to stand for the sum of 2800*l*, or for the sum of 2000*l*.

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Bovill, for the appellants. The principle of first taking the rateable value of the whole of the Company's apparatus in the several parishes in which it is situate, and then subdividing the amount among the several parishes, according to the quantity of land occupied by the apparatus in each parish, is erroneous. The Company derive no profit in *Putney* from the parts of the whole apparatus locally situate there, which are parts directly earning nothing, but indirectly conducing to earnings elsewhere. Their local rateable value in *Putney* is, therefore, the sum which would pay the rent of the land, taken by itself, which they occupy in *Putney*, and the profit on fixed capital invested therein; *Regina v. Overseers of Mile End Old Town* (a), *Regina v. West Middlesex Waterworks* (b). With this the value of the Company's apparatus situate elsewhere has nothing to do. [He was then stopped.]

T. Jones (Northern Circuit), for the respondents. The decision in *Regina v. West Middlesex Waterworks* (b) proceeded upon the particular facts there involved, and does not conflict with the general rule applicable to all such cases as the present, laid down in *Regina v. The Cambridge Gas Light Company* (c), namely, that the rateable value of the land occupied by the apparatus, pipes, &c., of the Company in the different parishes, is the sum which a tenant would pay yearly for them, less certain deductions; and that such value is to be distributed among the assessments of the several parishes in proportion to the quantity of land occupied by the apparatus, &c., in each parish. The Company are rate-

(a) 10 Q. B. 208.

(b) 1 E. & E. 716.

(c) 8 A. & E. 73.

able to the extent of the increased value of the land in *Putney*, in consequence of its being used by them for the purpose of conveying the water; *Rex v. Brighton Gas Light Company* (a).

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Bovill, in reply. In *Regina v. The Cambridge Gas Light Company* (b) the question was how to distribute the rateable value of the Company's apparatus among the assessments of parishes in each of which the Company supplied gas. That case, therefore, is not in point. The present case is not distinguishable in principle from *Regina v. West Middlesex Waterworks* (c). *Rex v. The New River Company* (d), *Regina v. Hammersmith Bridge Company* (e), *Regina v. Great Western Railway Company* (f), *Mayor, &c., of Liverpool v. Overseers of West Derby* (g), are also in favour of the appellants. Whatever difficulty there may be in determining the true principle of assessment, that adopted in this case was clearly wrong, and the appellants are, on that ground, entitled to the judgment of the Court.

Cur. adv. vult.

BLACKBURN J. now delivered the judgment of the Court (h).

In this case, on appeal by *The Chelsea Waterworks Company* against a rate made on them by the parish of *Putney*, for the relief of the poor of the parish, the Quarter Sessions refer to this Court only one question.

(a) 5 B. & C. 466.

(b) 8 A. & E. 73.

(c) 1 E. & E. 716.

(d) 1 M. & S. 503.

(e) 15 Q. B. 369.

(f) 15 Q. B. 379. 1085.

(g) 6 E. & B. 704.

(h) *Cockburn C. J., Wightman and Blackburn Js.*

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If the principle stated in the 16th paragraph of the case is correct, the rate is to be amended, and stand for 2800*l*. If that principle be not correct, then the rate is to be amended, and stand for 2000*l*. The general question as to the principle on which the rateable value of such property should be apportioned is one of great difficulty and importance, which has recently been the subject of much consideration; but in this case we are not asked nor authorized to say what is the correct principle, but only to determine whether this particular principle is right. Now that principle is, that the rateable value of the whole apparatus of the Company in all the parishes in which it is situate is to be ascertained, and then divided "among the said several parishes according to the quantity of land occupied by the apparatus in each parish." If this principle be correct, every square foot of land occupied by the apparatus is to be rated at the same rate, without regard to the situation or nature of the land, whether it was originally part of a barren heath, like *Putney Heath*, or part of the market ground of *Fulham*, and without regard to whether it be merely land occupied by pipes under the surface of the highway, or whether it be land upon which expensive buildings have been erected for the purpose of converting it into filtering beds or reservoirs. We have no difficulty in saying that this principle is not correct; we cannot sanction it; and therefore we must answer the only question put to us by saying the rate must stand for 2000*l*.

Judgment for the appellants. The rate to be amended to 2000*l*.

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The QUEEN *against* HERFORD.

Saturday,
June 9th.
Monday,
June 11th.

MELLISH had obtained a rule calling upon the defendant, the coroner for the city of *Manchester*, to shew cause why a writ of prohibition should not issue, directed to him, to prohibit him from further holding an inquisition respecting the origin of a fire at the shop and premises of *Levy Kriegsfeld*, No. 3, *Palatine Buildings*, *Hunt's Bank*, in the said city of *Manchester*.

It appeared from the affidavits that the said *Levy Kriegsfeld* was a dealer in India rubber and mackintosh goods, carrying on business on premises which were usually locked up at night. On the evening of 27th *March* last he locked up the premises and went home; shortly afterwards, a fire was discovered in the shop, and the chief constable of the city of *Manchester* suggested to the coroner the propriety of holding an inquest to ascertain, if possible, the origin of the fire. The coroner accordingly issued his precept to the chief constable to summon a jury, and proceeded to hold the inquest as had been suggested to him; acting solely upon that suggestion, and from a regard to his duty as coroner, and to the public interest involved in the discharge of such duty. *Levy Kriegsfeld* was called upon to attend the inquest, and he did so, accompanied by counsel, who objected that the coroner had no power to hold an inquest concerning a fire. The coroner, nevertheless, entered upon and continued the inquiry for some hours,

A coroner has no ex officio jurisdiction, at common law, to hold any other inquest than one on a dead body, *super visum corporis*. He cannot, therefore, hold an inquest to inquire into the origin of a fire by which no death has been occasioned.

Prohibition lies to a Court of criminal, no less than to one of civil, jurisdiction.

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during which time he examined *Levy Kreigsfeld* on oath, and then adjourned the inquest.

It further appeared that, in *London, Lincoln, Doncaster* and some other places, the coroners have of late years occasionally held inquests in cases of fire, when they were required to do so.

After the adjournment of the inquest, *Mellish* obtained the present rule.

Sir *William Atherton*, Solicitor General, *Wheeler* and *Fonblanque* now shewed cause. There are two points for consideration; First, whether prohibition is the proper course for raising the question involved; which is, Secondly, whether a coroner has, at common law, the jurisdiction which the defendant has assumed, of holding an inquest to inquire into the origin of a fire by which no death has been caused. Now, first, prohibition is not the proper mode of proceeding in criminal cases; and the present is a criminal, or, at all events, not a civil case. The jurisdiction which the defendant has assumed is of a similar character to that which he exercises in holding an inquest on a death; and is not civil. In *Blackstone's Commentaries*, book III., c. vii., p. 112, the Courts to which a writ of prohibition may issue are enumerated; and none of them are Courts of criminal jurisdiction. [*Crompton J.* In *Com. Dig.* tit. "*Prohibition*" (F. 6), instances are given of a prohibition, "If the suit be for a criminal matter."] 2 *Inst.* 600, there cited by *Comyns*, is a comment upon the statute of *Edw. I.*, entitled "*prohibitio formata de statuto articuli cleri*"; the sole object of which was to prohibit the spiritual Courts from taking cognizance of felonies. [*Crompton J.* The heading of the title in *Comyns* is in general terms. And

Goulson v. Wainwright (a), which he cites, shews that if articles *ex officio*, which require an answer upon oath, are exhibited in a spiritual Court against any person, for a criminal matter, such person may obtain a prohibition to that Court; though not if the matter is civil.]

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Mellish, *contra*. In *The Admiralty Case* (b) it appears to have been assumed that the prohibition, there refused upon another ground, would have lain to the Admiralty Court, for want of jurisdiction to take cognizance of a criminal offence not committed on the high seas. It is true that the report says "if one be sued in the Admiralty Court," &c.; but it appears from the context that the proceeding was for a criminal matter.

Sir *William Atherton*. The suit in that case was clearly a civil one. The Courts to which prohibition will issue are enumerated also in *Com. Dig. "Prohibition"* (A. 1.): and are, all of them, either civil or spiritual. Forms of the writ are given in *Fitzherbert, de Nat. Brev. tit. "Prohibition"*; but none of them are framed for a criminal Court. In *Pomfraye's Case* (c), the main question in which was whether an information under the statute of usury, 37 H. 8. c. 9., was properly laid before justices in Sessions, or ought to have been prosecuted in the superior Court, the point whether prohibition would lie to the Court of Quarter Sessions was also mooted; and seems to have given rise to a difference of opinion, and to have been left undecided. *Grant v. Sir Charles Gould* (d) is an instance of an application for a prohibition to a Court martial; but there the objection that no prohibition would lie to such

(a) 1 *Sid.* 374.(b) 12 *Rep.* 77, 78.(c) 1 *Litt.* 163.(d) 2 *H. Bl.* 69.

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a Court was not raised ; and the application was refused on another ground, namely, that as the applicant had been in the receipt of pay as a soldier, the Court martial had jurisdiction to try him, although he had assumed the military character merely for recruiting purposes. Secondly, the coroner has, at common law, the jurisdiction which the defendant has assumed in the present case ; and no statute has put an end to it. The office of coroner is, as stated by *Blackstone, Commentaries*, book 1., c. ix., p. 347, of equal antiquity with that of sheriff. At the following page *Blackstone* gives a description of its duties ; and another is to be found in *Hale's P. C.* pl. 2, c. 8, vol. 2, p. 56, (ed. 1800, by *Dogherty*.) Neither of these, it is true, includes the holding an inquest on the cause of a fire among those duties ; but neither of them is exhaustive. On the other hand, this particular jurisdiction, if it existed at common law, has not been taken away by any statute ; although many statutes, *Magna Charta* for instance, cap. 17., as is shewn by Lord *Coke* in his comment upon it in 2 *Inst.* 31. 32, have deprived the coroner of certain of the powers anciently appertaining to his office. Notwithstanding those statutes, the coroner's common law jurisdiction extends far beyond that which is now popularly considered as its limit : namely, the holding inquests super visum corporis. *Nathaniel Bacon*, in his *Historical and Political Discourse of the Laws and Government of England*, cap. 23, sect. 2, p. 41, (ed. 4, of 1739), says that in the *Saxon Kingdom* the coroner's work "was to inquire upon view of manslaughter, and by indictment of all felonies as done contra coronam, which formerly were only contra pacem, and triable only by appeal." The same author, in cap. 69, p. 179, treating of the jurisdiction of coroners in the reigns of

Henry III., Edward I. and Edward II., says that the statute of *West. 1. c. 10.* "holds" them "to the work of taking inquests and appeals, by indenture between themselves and the sheriff: and these were to be certified at the next coming of the justices." This writer is said, on the title page, to be authenticated by *Selden*. The statute "*De officio coronatoris*," 4 *Edw. 1. stat. 2.*, is declaratory, and merely in affirmance of the common law. It does not specify the particular jurisdiction of the coroner now in question, to hold inquests on fires; but it mentions as the duty of these officers, in addition to viewing dead bodies, "*quod accedant ad*" "*domorum fractores, vel ad locum ubi dicitur thesaurum esse inventum.*" Besides, the statute ends very abruptly, and is probably imperfect; omitting, as it does, to mention so well defined a part of the coroner's duty as the holding an inquest on the bodies of those who die in gaol. *Jervis*, in his work *On the Office of Coroners*, pp. 24, 32 and 33, citing *Hawkins's Pleas of the Crown*, book II., c. 9, sects. 21 and 35, points out that this statute does not restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty, not mentioned in the statute, and which was incident to his office at common law. In order therefore, to ascertain what were the power and duties of the coroner at common law, reference must be made to the old authorities. First of these, in point of antiquity, is *Andrew Horne's Mirror of Justices*; which is thus alluded to in *Reeve's History of the English Law*, vol. 2, p. 358 (ed. 2): "*The Mirror of Justices* is a book, whose consideration may properly belong to this reign" (*Edw. II.*) "This singular work has raised much doubt and difference of opinion concerning its antiquity. Some have pronounced it

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older than the Conquest; others have ascribed it to the time of *Edward II.* Both these opinions may be partly right. There may perhaps have been a work by this name as early as the date supposed; but whoever judges from the internal evidence of this book will be satisfied, that great part of it is of a period much later, and certainly written after *Fleta* and *Britton*; for it states many points of law, as it were, in a stage of progression somewhat receding from those writers, and approaching nearer to those of later times. It is probable that *Andrew Horne*, whose name it bears, might take up an ancient book of that name, and work it into the volume we now see, in the reign of this king, or at the end of the former; and if so, we should expect that whatever it propounds was actually law in the reign of *Edward II.*" In cap. 1, sect. 13, of the *Mirror*, translation by *Hughes*, pages 38 to 49 (ed. 1768), entitled "Of the Office of the Coroners," there is a very full account of the coroner's duties and jurisdiction. The section commences thus: "To coroners anciently were enjoined the keeping of the pleas of the Crown, which extend now but to felonies and adventures. There are two kinds of coroners, general and special. To the office of general coroners it belongeth to receive the appeals of all the county, of felonies done within the year." It then states, that "special coroners are coroners of liberties, and of privileged places," and proceeds: "To the office of one and the other it doth belong, to view the carcasses of the dead by felony, or by mischance; or to see the burnings and the wounds, and the other felonies, that is to say, every one in his bailiwick; and to see treasure trove and wrecks of the sea, and to take the acknowledgments of felony, and to give the abjuration to flyers to sanc-

tuary, and to take the inquests of felonies happening within their bailiwicks." Again, at page 42, it is stated: "Also, they used to inquire of burnings, and who put to the fire, and how; and whether it were by felony or mischance; and if of felony, of whose felony, and who were the principal, and who the accessaries, and who were the threateners thereof." [*Blackburn J.* Can you produce any reported instance of an inquest held on a fire by a coroner?] No such instance has been discovered; probably because coroners, since the creation of justices of the peace by stat. 1 *Edw.* 3. c. 16., allowed the justices to exercise their functions in this respect. Mere disuse, however, would not deprive the coroners of their jurisdiction. The next authority in point of time is *Bracton*, who, in lib. 3, folio 121, cap. 5, "De officio coronatorum sopra homicidium," says, "Cum autem contingat homicidium fieri quandoque in domibus, quandoque in villis, quandoque in vicis, quandoque in campis extra villam, et etiam in nemoribus, et ad coronatores pertineat de hujusmodi occisis cognoscere et de interfectore, quis ille fuerit, si nesciatur, diligentem facere inquisitionem: ideo bonum est videre quale sit eorum officium in hac parte. Est igitur eorum officium quòd quàm citò habuerint mandatum a ballivo domini regis, vel a probis hominibus illius patriæ: accedere debent ad occisos vel vulneratos, sive ad submersos vel subito mortuos, et ad domorum fractiones, et ad locum ubi dicitur thesaurum fuisse inventum, et hoc facere debent statim et sine morâ aliquâ." So *Fleta*, lib. 1, c. 18, § 5, p. 20 (ed. 1647, by *Selden*), "De coronatoribus," writes, "Imprimis fideliter præsentent de omnibus murdris, homicidiis, feloniis, per quem, quando, et ubi, in terrâ videlicet, vel in aquâ, bosco, placio, vel marisco,

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1860. vel in villâ, vel extrâ." Of the work of *Fleta*, *Reeve*
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 V. says, that it is "a treatise upon the whole law, as it stood
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Bracton in the manner and matter of" the work, having
 adopted his plan, and, in many instances, transcribed
 whole pages from him. "He did not, however, confine
 himself to *Bracton* as his sole guide, but had also an eye
 to *Glanville*. Many obscure passages in those writers
 are illustrated by *Fleta*." Again, in *Britton*, c. 1, sect.
 3, p. 11 (*Kelham's* translation, 1762), it is said: "Also,
 it is our pleasure, that as soon as any felony or misad-
 venture has happened, or treasure be found designedly
 concealed underground, or in case of the rape of women,
 or of the breaking of our prison, or of a man wounded
 almost to death, or of other accident happening, that
 the coroner, as soon as ever he has notice of it, issue his
 precept to the sheriff, or the bailiff of the place where
 the accident happened, that at a certain day he cause to
 appear before him at the place where the accident hap-
 pened, the four adjacent townships, and more if need
 be, by whom he may inquire of the truth of the casualty."
 And, in sect. 32 of the same chapter, p. 25: "And
 whereas we have declared above, that coroners ought to
 make inrollments of appeals of felonies, of the death of
 a man; let them have the like power in appeals of rape,
 robbery, larceny, and in appeals of every other kind of
 felony." These authorities shew that Lord *Coke* did
 not accurately state the law when he laid down, in 4
Inst. 271, that "the coroner can inquire of no felony but
 of the death of man, and that super visum corporis."
 [*Blackburn J.* In the *Liber Assisarum*, 27 *Edw.* 3.,
 fol. 141, pl. 55, it was held that the coroner has no

power to entertain any indictment except *super visum corporis*. And in *Yearb. 35 H. 6. pl. 33. [B]*, fol. 27, the law is stated to the like effect as to all coroners, except those in *Northumberland*, by the custom of which county the coroners may take cognizance of all felonies.] In *Garnett v. Ferrand* (a) Bayley J. said, "At common law the coroner had power to hear and determine felonies," "therefore his Court was analogous to the ordinary Courts of law, but his powers were abridged by *Mag. Car. c. 17.*" At page 32 of *Jervis On the Office of Coroners*, the author says: "It would seem, from the statute *de officio coronatoris*, that the authority of coroners with respect to felony was not limited to inquests of death only; for by that statute they are directed to inquire of breakers of houses; and *Britton*, in his paraphrase upon that statute, treats of their duty with reference to inquiries concerning rape and prison-breach. It is, however, said, and supported by great authority, that coroners have no power *ex officio* to inquire of any felony, but only of the death of a man upon a view, and cannot take an indictment in any other case. But this is doubted by *Hawkins*, who contends that coroners may still, if they please, inquire of rape, prison-breach, and house breaking, their powers in that respect never having been expressly taken from them. For the maintenance of this opinion he relies upon the express words of the statute *de officio coronatoris*, and upon the commentary of *Britton* before alluded to, and argues, that the authorities, 27 *Ass. 55* and 35 *H. 6, pl. 27 b. (b)*, upon which the contrary doctrine is founded, do not decidedly resolve the point, this question having

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(a) 6 *B. & C.* 611. 620.

(b) Apparently a misprint for "pl. 33 [B]."

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there arisen incidentally merely, and by way of argument, upon a collateral discussion." *Hawkins's* is the better opinion. The coroner still has the larger jurisdiction which that writer assigns to him. *Magna Charta*, c. 17, did not, as Lord *Coke* erroneously supposes, take it away. It is thereby enacted, "Nullus vice-comes constabularius coronator vel alii Ballivi nostri teneant placita coronæ nostræ." But the pleas of the Crown there intended are matters in which there is both accusation and answer by the accused, neither of which takes place on an inquisition before the coroner. The inquisition does not become an indictment until it is signed and returned. [*Blackburn J.* Does not the fact, that no trace of the exercise by the coroner of the jurisdiction for which you contend can be discovered, tend to shew that cap. 17 of *Magna Charta*, which is certainly capable of such a construction, took it away?] As has been already observed, mere desuetude would not do away with the jurisdiction, nor can that circumstance affect the construction of the statute. [*Wightman J.* Could the coroner take any fee for holding an inquest on a fire?] Probably not; but when the office was first created, he could take no fees at all (a).

Mellish and *Fearnley*, contra. The question is concluded by authority. *Coke*, *Hale*, and all subsequent writers on the subject, except *Hawkins*, are clearly of opinion that a coroner has no jurisdiction to inquire into anything except the death of man, and that *super visum corporis*. Lord *Coke*, in his comment on cap. 17 of *Magna Charta*, clearly implies that, in his opinion, the

(a) See *Stat. Westm.* l. c. 10., declared by Lord *Coke* (2 *Inst.* 176) to be in affirmance of the common law.

coroner had no further jurisdiction, even before that statute. His words are (a): "But what authority had the sheriffe in pleas of the Crown before this statute? This appeareth by *Glanvill*, that the sheriffe in the tourn (for that is to be intended) held plea of theft, for he saith; excipitur crimen furti, quod ad vice-comitem pertinet, et in comitatibus placitatur; but he may inquire of all felonies by the common law, except the death of man. And what authority had the coroner? The same authority he now hath, in case when any man come to violent, or untimely death, super visum corporis, &c. Abjurations and outlawries, &c., appeales of death by bill, &c. This authority of the coroner, viz., the coroner solely to take an indictment, super visum corporis; and to take an appeale, and to enter the appeale, and the count remaineth to this day. But he can proceed no further, either upon the indictment, or appeale, but to deliver them over to the justices. And this is saved to them by the statute of *W. 1. c. 10*. And this appeareth by all our old books, book cases and continuall experience." There is some difficulty in distinguishing between the ancient jurisdiction of the coroner in appeals and in indictments. The probability, however, is, that appeals were not brought in the Court of the coroner, but in the county Court, which was distinct from it, and of which both the sheriff and the coroner were members; and that in the county Court appeals of all other felonies than the death of a man were taken before the sheriff; and appeals of felonies relating to the death of a man, before the coroner. Inquests on the dead, on the other hand, were taken in the coroner's separate Court only. It is also extremely

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doubtful whether or not, in appeals of felony, the coroner was assisted by a jury. The statute *de officio coronatoris*, 4 *Ed.* 1. stat. 2., perhaps leaves it an open question whether the coroner anciently had the jurisdiction contended for by the other side. But that statute is a mere abridgment of so much of *Bracton's* work as treats of the coroner's jurisdiction; and *Bracton* nowhere says that he has jurisdiction to inquire as to the burnings of houses. Apparently, therefore, the coroner, in *Henry III.*'s time, had no such jurisdiction. It is true that *Bracton*, in the passage cited on the other side, says that the coroner is to go "*ad domorum fractiones*," as well as to people dead or wounded; but it is clearly meant that he is to go there merely in order to see if a death has been thereby caused; and that he is to hold an inquiry only "*de homine occiso*," if, when he gets to the spot, he finds that a man has been killed. The same author, lib. 3, folio 122, c. 7, "*De officio coronatorum in raptu virginum*," shews that the coroner's jurisdiction in that respect is limited to hearing an appeal, and that he is not to hold an inquest. The jurisdiction is founded, only, "*si quis ab aliquâ de raptu fuerit appellatus, et factum recens fuerit*;" in which case "*attachietur appellatus*." Of the same nature is the coroner's jurisdiction "*de pace et plagis*;" as appears from the following cap. 8. "*Si quis de pace et plagis fuerit appellatus*," "*si plaga mortalis fuerit, et appellatus inveniatur, statim capiatur, et captus detineatur, donec sciatur utrûm vulnus convalescere possit vel non, si autem non et moriatur, appellati retineantur in prisonâ. Si autem convalescat, attachietur appellatus*." And in lib. III., fol. 146, cap. 27, where the author treats "*De appello de iniquâ combustionem*," a similar course of procedure is laid down. He says, "*Si quis*"

"*ædes alienas nequiter combusserit, et fugerit, si sit qui accuset, et sequatur, procedatur contrà ipsum sicut de aliâ feloniâ; si non, tunc inquiratur veritas in adventu justitiariorum.*" *Fleta*, who in other respects agrees with *Bracton*, omits to mention a visit ad domorum fractiones as part of the coroner's duty. *Britton's* is a very brief work, and not of such authority as the others. Its language is wider, but states the law too loosely and generally. *The Mirror of Justices* is of no authority whatever. It is not even known with certainty when it was written; and it is very probably a treatise on the laws of the *Saxons*. The book contains so many gross inaccuracies relating to the jurisdiction of coroners, that no one passage in it can be considered more reliable than another. For instance, in the chapter from which the other side have made citations, cap. 1, sect. 13 (*Hughes's* translation, ed. 1768), it is said, at p. 41, that if a man be killed by false judgment, the jury of the coroners are to "declare who were the judges, who the officers to form the judgment and who accessaries, and if of false witnesses, who were they, and the jurors." Again, from the enumeration, at p. 42, of the different kinds of accessaries, it appears that the coroner, according to the author, was to inquire of accessaries after, as well as before, the fact. On the same page occurs the statement that "Coroners also ought to make their views of sodomies, and of monstrous births of children, who have nothing of humanity, or who have more of other creatures than of man." These passages are sufficient to shew that the statement which follows, that coroners "used to inquire of burnings, and who put to the fire, and how," is one to which not the smallest authority can attach. The statute of *Marle-*

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bridge, 52 *H. 3. c. 24.*, enacts as follows: "Justiciarii itinerautes de cætero non amercent villatas in itinere suo, eo quòd singuli duodecim annorum non venerint coram vice-comitibus et coronatoribus, ad inquisitiones de roberiis, et incendiis, et aliis ad coronam spectantibus faciend'; dum tamen de villatis illis venerint sufficientes, per quos hujusmodi inquisitiones plenè fieri possint: exceptis inquisitionibus de morte hominis faciend', ubi omnes duodecim annorum venire debent, nisi rationabilem habeant causam absentiae suæ." Lord *Coke*, commenting on this statute, mentions, as one of the mischiefs which it was passed to prevent (*a*), "That when any robbery, burning of houses, homicide, or other felony, was done, the sheriffe, for so much as pertained to him, or the coroner in case of the death of man, would summon many townships, and sometimes a whole hundred, where twelve would serve to make inquiry." And this construction, reddendo singula singulis, has always been put upon the statute. Again, by the *Articuli super chartas*, 28 *Edw. 1. c. 3.*, it is enacted, that (*b*) "Pur ceo que avant ces heures mults des felonies faits dedeins la vierge ount estre depunies, pur ceo que les coroners de pays ne soient pas entermis denquirer des tiels maners des felonies dedeins la vierge;" "ordeine est, que desormes in case de mort de home, ou office de coroner appent as viewes, et enquests de ceo faire, soit maund al coroner del pays, que ensemblement ove le coroner del hostel le roy face loffice que appent, et le metter en rolle." Lord *Coke*, in a note to this passage, says: "This is understood of felonies of the death of man; for the inquiry of that felony belongs to the office

(*a*) 2 *Inst.* 147.

(*b*) Lord *Coke's* spelling is followed in this citation.

of the coroner of the vierge, and so it is" "in this Act explained, office del coroner appent a viewes et enquests de ceo faire." Again, in 4 *Inst.* 271, Lord *Coke* says: "As the sherif in his tourn may inquire of all felonies by the common law, saving of death of man, so the coroner can inquire of no felony but of the death of man, and that super visum corporis: he shall also inquire of the escape of the murderer, of treasure trove, deodands, and wrecks of the sea." To the same effect is the statement by *Staundford*, in "*Les Pleees del Coron*," 51 *H.*: "Cest estatut" (de officio coronatoris) "quaunt al inquisition a prender, extenda soy totalement sur mort person, per que semble que le coroner ne peut inquerer dauter felony, forsque de mort d'homme." The author adds, that *Britton*, in fol. 3 of his work, had expressed the contrary opinion "Que il peut inquier de rape de femme, et de debruser de prison, queux sont auter felonies, que nest morte d'homme." To these authorities may be added that of *Hale*, who, in his *Pleas of the Crown*, vol. 2, p. 56 (ed. 1800, by *Dogherty*), says: "For inquisitions. Regularly the coroner hath no power to take inquisitions, but touching the death of a man and persons subitò mortuis, and some special incidents thereunto." So again, at page 65: "I. By what hath been before said it appears, that the coroner hath power to take an inquisition of felony of the death of a man, and likewise of certain incidents thereunto. 1. Of accessories before the fact, but not of accessories after. 2. Of the escape of the manslayer, that thereupon the township may be amerced, which is further confirmed by stat. 3 *H.* 7. c. 1. 3. Of his flight. 4. Of his goods and chattels. But he hath no power to take an inquisition of any other felony, though in some cases he hath

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power to take appeals of other matters, as shall be said hereafter. 2 *Co. Instit.* p. 32. Only by custom in *Northumberland* the coroner hath power to inquire of other felonies." "But it is said that he may take the confession of him that breaks prison, and upon his record thereof the party shall be hanged."

"2. But although he has power to take an inquisition touching the death of a man, it must be *super visum corporis*, and not otherwise." So in *Com. Dig.* tit. "Officer," "Coroner," (*G. 5.*), headed "Jurisdiction of the Coroner. To take an appeal, &c.," it is said: "He has jurisdiction with the sheriff to take an appeal of robbery, or other felony, in the same county, in the County Court: by the stat. 3 *H. 7. 1.*" But in the subsequent article (*G. 11*), headed, "To take an indictment," it is stated, "That the coroner, notwithstanding *Magna Charta*, c. 17, may take an indictment upon the death of a man. 2 *Inst.* 32. But only upon the death of a man, not for other felony. 4 *Inst.* 271. And this shall be, *super visum corporis*, otherwise it is void. 4 *Inst.* 271. *H. P. C.* 170." [*Wightman J.* In *Bac. Abr.* tit. "Coroners," (C), sub. fin., is this statement: "According to some opinions, a coroner *ex officio* hath no power to take any indictment, except of the death of a man." And, in the marginal note to that passage, "Without custom he hath no authority to take any inquisition other than on death."] That statement is in conformity with the other authorities which have been cited, most of which are there referred to.

(They were then stopped.)

COCKBURN C. J. I am of opinion that this rule must be made absolute, for that a coroner acts beyond

the proper limits of his office and jurisdiction in holding an inquest upon a fire. We have the authority of three of the very greatest expositors of the law of *England*, to the effect that the power of a coroner to hold inquests is limited to cases of homicide, or violent death, and that the inquest must be held *super visum corporis*. This is clearly laid down both by Lord *Coke* and by Lord *Hale*, in the plainest terms; and is adopted by Chief Baron *Comyns* without the expression of the slightest doubt on the subject. In the absence of an express enactment to the contrary, these authorities are amply sufficient to shew that a coroner does not possess the jurisdiction which has been contended for. Besides, there appears to have been, from the time of *Edward I.*, certainly, if not from an earlier period, down to within the last few years, a uniform abstinence by coroners from the exercise of such a jurisdiction. Had its exercise formed part of their duties, they would surely not have allowed it thus to fall into abeyance. Independently of these considerations, the Acts of the Legislature from time to time, with reference to coroners, must be regarded as, to some extent, an exposition of the law on the subject. For instance, coroners were at first prohibited from taking fees; but in process of time, when men of lower position than had theretofore been the case, came to fill the office, the Legislature, by several statutes, commencing with stat. 3 *H. 7. c. 1.*, provided for their remuneration by fees. In each of these statutes (a) the fees authorized to be taken are limited to cases of inquests on the view of a dead body. Hence it may be inferred that, in the opinion of the Legislature, coroners

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(a) See these statutes enumerated in *Bac. Abr.*, tit. "*Coroners*," (G).

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possessed no jurisdiction to hold any other inquests: for otherwise it is reasonable to suppose that Parliament would have permitted them to take fees in cases of arson, for instance, as well as in cases of death. The only difficulty arises upon the statute *de officio coronatoris*, and the passages in *Bracton* and *Britton* which have been referred to. The statute in question says that the coroner is to go, not only to the places where any are slain, or suddenly dead, or wounded, but also "where houses are broken." This might seem to imply that he is to hold inquests in cases of burglary and house-breaking. Mr. *Mellish* has however, I think, removed this difficulty by shewing that the statute was more or less an abridgment of the common law on the subject, as propounded by *Bracton*; for on reference to that author we find that when he says that the coroners "*accedere debent ad*" "*domorum fractiones*" he has in his mind either a case of appeal, or the case of an inquest to be held upon the body of a man killed when the house was broken into. I think, also, that Mr. *Mellish* has satisfactorily explained the meaning of the statute of *Marlebridge*, 52 H. 3. c. 24., so far as language so obscure is capable of explanation. I do not say that the question is altogether free from difficulty: but when we find that, from the time of *Edward I.* to the present, the alleged jurisdiction has never been exercised; that the contemporaneous exposition of stat. 4 E. 1. stat. 2. is consistent with its non-exercise; and that great authorities, *Hawkins* alone excepted, are unanimously against its existence; I think that our course is clear, to the decision that the jurisdiction never did exist. I give no opinion whether or not it is desirable that coroners should have such a jurisdiction. That is a question for the Legislature, not for us, to determine.

WIGHTMAN J. The question before us is one of very general importance; and as I understand that it has become the practice of late years to hold inquests in like cases, and it does not appear that there has ever been an express decision on the point, I could have wished for more time to look closely into the authorities, but for the clear opinion which the Lord Chief Justice has expressed, and with which I am disposed to agree. Whatever the original jurisdiction of the coroner may have been, it was, clearly, very considerably limited by *Magna Charta*, c. 17, and has been, since the statute *de officio coronatoris*, confined to the matters therein mentioned; the principal of which is the holding inquests on the death of man *super visum corporis*, and the remainder of which must have reference not to inquests but to appeals. The principal ground upon which I rely is that, since that statute, there has been, till quite recently, no recorded instance of an exercise by a coroner of the jurisdiction now attempted to be established. Lord *Coke*, in 2 *Inst.* 32, where he contrasts the power of the sheriff and of the coroner, gives a precise opinion that the latter has no authority to hold any other inquest than one on a death, and that *super visum corporis*. This opinion is fortified by the very high authority of Lord *Hale*. It is true that there is a dictum to the contrary in *Hawk. P. C.*, Lib. II., c. 9, sect. 21, p. 79 (ed. 1824, by *Curwood*), where it is said, "This statute" (*de officio coronatoris*) "being wholly directory, and in affirmance of the common law, doth neither restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty, not mentioned in it, which was incident to his office before; and from hence it follows, that though

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the statute mention only his taking inquiries of the death of persons slain or drowned, or suddenly dead; yet he may and ought to inquire of the death of all persons whatsoever who die in prison, &c." Again, in sect. 35 of the same chapter, p. 83, the same author says: "It is expressly said in some books that a coroner hath no power *ex officio* to inquire of any felony, but only of the death of a man upon view. And both *Staundford* and *Hale* seem to speak doubtfully of this matter upon the authority of those books; and Sir *Edward Coke* seems expressly to declare his opinion, that a coroner hath no power to take an indictment in any other case. Yet since it is expressly declared by the above mentioned statute" (*de officio coronatoris*) "that a coroner ought to inquire of the breakers of houses; and it is said by *Britton* that he may inquire of rape, and of the breach of a prison; and such power hath never been expressly taken from him; it seems hard to say that he may not still make such inquiries, if he please." "As to the authority of 27 *Ass.* 55 and 35 *H.* 6, pl. 27 b. (a), which are cited for the maintenance of the contrary opinion, it may be answered that this point is not resolved in either of those books, but only spoken of incidentally: for the very point resolved in the Book of Assizes seems to be no more than this, that a coroner hath no power to take an indictment of an accessory after the fact; and that which is said in the Year Book of *H.* 6. concerning this matter, is only brought in by way of argument concerning a point of a quite different nature." These passages, however, amount to no more than an expression of opinion, based upon a comparison of the ancient authorities; which, it must be remembered, are

(a) Apparently a misprint for pl. 33 [B].

always obscure and often vague. The best guide to the discovery of the duties of an ancient office is custom ; and in the present case the custom is opposed to the existence of any such jurisdiction as that which has been claimed before us for the coroner.

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(CROMPTON J. had left the Court.)

BLACKBURN J. I am of the same opinion. We are called upon to prohibit the coroner from further holding this inquest; on the ground that, in holding it, he is acting beyond his jurisdiction. As to the question whether this is a case in which prohibition lies, I think it sufficiently appeared, in the course of the argument, that it is. The question, then, is, has the coroner this particular jurisdiction? It is said that he has it at common law; and that his common law powers in this respect were left untouched by *Magna Charta*. Now there are two methods of shewing that a jurisdiction exists at common law; namely, either by proof that it has been actually exercised, or by the citation of passages from leading authorities, decidedly asserting its existence. But in the present case not only can no instance of the exercise in fact of the jurisdiction in question be adduced, but *Coke*, *Hale* and *Comyns*, following *Staundford*, a great authority on such a point, all agree that the coroner can hold no other inquest than that on view of a dead body. The only two recorded instances in which a coroner has exercised any other jurisdiction were, both of them, cases in the city of *London*; brought in the Court of the sheriff and coroner by way of appeal, and not before the coroner alone by way of inquisition. Mr. *Mellish* has explained

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the distinction between the Court of the coroner alone and that composed of the sheriff and the coroner together. On the other hand, we find that, in a case reported in the Book of Assizes, 27 E. 3., fol. 141, pl. 55, this Court sent back an indictment forwarded to it by the coroner: giving as a reason, according to the report, that a coroner cannot hold an inquest, except on a dead body, unless by special writ directed to him for the purpose. The law is plainly laid down to the same effect in *Yearb.* 35 H. 6., pl. 33 [B], fol. 27. The obscure and difficult passages which have been cited to us from *The Mirror*, *Britton*, *Bracton* and *Fleta* are not sufficient to shew that a coroner ever had jurisdiction to hold an inquest on a fire. But, even if he had it at one time, the authority of *Hale*, *Coke* and *Comyns*, fortified by the general custom of the office, is strong to shew that it was taken away, at all events, by *Magna Charta*. It is true that it would not be abrogated by mere non-user; but when the non-user has prevailed for many hundred years a strong presumption is afforded thereby against the existence at any time of that which has been thus in disuse. My brother *Crompton* authorized me to say that, although the statute *de officio coronatoris* at first raised a doubt in his mind, he is satisfied with Mr. *Mellish's* explanation of it, and now agrees in the view which has been expressed.

COCKBURN C. J. If we did not state our opinion sufficiently during the argument, I wish to add that we entertain no doubt but that a prohibition may issue to a Court exercising criminal jurisdiction as well as to a civil Court.

Rule absolute.

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REGINA against WILLIAM SEAGER WHITE and
ANN FISHER.

Tuesday,
May 29th.
Tuesday,
June 12th.

C. R. KENNEDY, on May 29th, moved for and obtained a rule calling on *John Birt Davies*, Esq., the coroner for the borough of *Birmingham*, to shew cause why a writ of certiorari should not issue to remove into this Court all inquisitions taken before him on the body of *Emma Stafford*.

A coroner has no power, after holding an inquest super visum corporis and recording the verdict, to hold a second like inquest, *mero motu*, on the same body; the first not having been quashed, and no writ of *melius inquirendum* having been awarded.

It appeared, from the affidavits on which the rule was obtained, that there had been two inquisitions held on the body of the said *Emma Stafford*; and that, under the first of them, the jury found that she had died from natural causes; but, under the second, a verdict of wilful murder was returned against the defendants *White* and *Fisher*, who were committed to prison by the coroner's warrant on that charge. The rule was moved for with a view to quash this second inquisition.

Kennedy, in moving the rule, argued that, the first inquisition having been held super visum corporis, it was not competent to the coroner to take a second, the first remaining unquashed, and no *melius inquirendum* being awarded. And that, even if the first should be quashed, the coroner could only be empowered to take a second by the order of the Court.

He cited 2 *Hale's P. C.*, pp. 58, 59 (ed. 1800, by *Dogherty*); "If the coroner take an inquisition without view of the body, he may take a second inquisition super visum corporis, and that second inquisition is good for the first was absolutely void. 2 *R.* 3. 2., 21 *E.*

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4. 70. But if a coroner takes an inquisition super visum corporis, and after this another coroner takes an inquisition upon the same matter, the second inquisition is void, because the first was well taken. *M. 6 R. 2. Coron.* 107. *Crompt. Justic.*, 229. b. If a coroner takes an inquisition super visum corporis (as upon a felo de se), and that is sent into the King's Bench and quashed, the coroner may take a new inquisition super visum corporis." Also *Umfreville's Lex Coronatoria*, p. 136 (ed. 1822, by *Grindon*) (p. 220 of original edition of 1761); in which the case of the two inquests on Serjeant *Jenney's* servant, reported in *Yearb. 2 R. 3.*, fol. 2. pl. 5, and referred to in the above extract from *Hale*, is cited at length. And *Hawk. P. C.*, Lib. II., c. 9, s. 23 (vol. 2, p. 80, of *Curwood's* edition), in which the same case is thus spoken of. "It hath been resolved, that a coroner may lawfully within convenient time, as the space of fourteen days after the death, take up a dead body out of the grave in order to view it, not only for the taking of an inquest, where none hath been taken before, but also for the taking of a good one, where an insufficient one hath been taken before." Also, *Anonymous* (a), where "The Court granted a rule for the coroner in *Wenlock* in com' *Salop* to take up a body in order for a new inquisition, the former having been quashed." And *Rex v. Saunders* (b), where "*Yorke* moved for leave for the coroner to take up the body, and take a new inquisition according to 2 *Sid.* 101 (c), *Salk.* 377 (d), which was granted; and it was said, the coroner could not do it without leave of the Court."

Rule nisi.

(a) 1 *Strange*, 532.

(b) 1 *Strange*, 167.

(c) *Barclay's Case*.

(d) *Regina v. Clerk*, 1 *Salk.* 377.

It appeared, from the affidavits filed on shewing cause against the rule, that the coroner had held an inquest on view of the body of *Emma Stafford* on 17th *May* in the present year, at which a verdict of "Died by the visitation of God" was recorded. On 18th *May*, before the body was buried, he received further information, upon the receipt of which he deemed it his duty to hold a second inquest, being of opinion that there was occasion for further inquiry; and, thinking it expedient for the furtherance of justice that the second inquest should be held before the marks, if any, on the body were effaced by decomposition, he held a second inquest on the body on 21st *May*, at which a verdict of wilful murder was found against *White*, as principal, and *Fisher*, as accessory before the fact. The coroner also made the following affidavit. "In deciding to hold the second inquest, I was partly guided by the following precedents: *Regina v. Thomas Jennings*, for the murder of *Eleazer Jennings*, wherein a second inquest was held, the first being unquashed, and the prisoner was convicted (and afterwards executed) for murder, at the *Berks* Lent Assizes, 1845. At the *Warwick* Lent Assizes, 1846, *Mary Marsh*, who had been committed for murder by me upon a second inquisition, the first being unquashed, was tried for that offence, and the presiding Judge, *Coltman J.*, did not express any disapproval of the holding the second inquest, although counsel for the prisoner had strongly drawn attention to the inquest being a second, and opposed to the first in its finding: but the prisoner was acquitted on other grounds. There was a similar contrariety of verdicts in the case of *Thomas Jennings*."

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Field now shewed cause. The question is, whether a coroner, after he has held an inquest super visum corporis and the jury have returned a verdict, can hold a second inquest before a fresh jury (*a*). In favour of his jurisdiction to do so is the following passage in *Britton*, cap. 1, pl. (7), fol. 4 (ed. 1640, by *Wingate*): "Et si le coroner de la premere enqueste eyt suspesion de concelement de la verité ou que mestre soit de plus enquere et par autres, si enquerge plusours foitz. Mes pour nule contrarieté de verdit ne change ne amenuse son enroulement en nul point". Which passage is thus rendered in *Kelham's* translation, p. 14 (ed. 1762). "And if the coroner on the first inquiry suspect concealment of the truth, or that there may be occasion for a further inquiry, and that by others, let inquiry be made again and again; but let him not on account of any contrariety in the verdicts, change or alter his inrollment in any point." *Kelham* adds, in a note; "By others, i. e., by other evidence, not by other jurors"; and refers to *Umfreville's* note on this passage, in his *Lex Coronatoria* (Introduction), p. xlv. (*b*). At the place referred to, *Umfreville* translates the passage in *Britton* thus: "And if the coroner upon the first inquiry shall suspect the truth to be concealed, or that it be necessary to make further inquiry, and by others, let his inquiry be often, but in no point to change or alter his inrolment, upon account of any contrariety in the verdicts." And the note thereon is as follows: "This paragraph is darkly expressed by *Britton*, and requires some expla-

(*a*) That the jury on the second inquest was a fresh one did not appear on the affidavits, but was admitted by counsel.

(*b*) See the original edition of *Umfreville*, 1761. *Grindon* (ed. 1822) omits this note.

nation; though it may be rather of speculation and curiosity than use. The seeming difficulty is how to understand the author's meaning, when he tells us, the further inquiry is to be 'par autres,' whether by other *jurors*, or by other *evidence*. From the conclusion of the paragraph which directs the coroner in no point to alter his record, by reason of any contrariety in the verdict, it might *primâ facie* be conceived, that the coroner might summon other *jurors*, to inquire, &c., which might cause *contradictory verdicts*. But the fact is not so, nor could the coroner summon a second jury; nor is the word *verdict* here made use of to be understood of the ultimate finding of the jury, but only of the separate opinion of the several *viles* summoned to inquire, which often made further evidence necessary, and caused adjournments. When the ultimate finding was to be received, and all could not agree, the *viles* were then to be separately examined, and were separately required to give their opinion; and the judgment of each *ville* was then separately to be recorded by the coroner, as the "*dicta utriusque partis*", but the complete verdict, or effective finding, was to be collected "*ex dicto majoris partis juratorum*," from the majority of the jurors agreeing one way: "*et standum est dicto majoris partis juratorum*," was then record-reasoning; and distinctly to specify and record the "*dicta utriusque partis*," was then the customary usage. And this seems explained by the *Mirrour*, c. 1, §. 13, and confirmed by the curious records communicated in the notes ad 2 *Hale*. P. C. 297. Vid. *Brit.* 12. b. This further inquiry, therefore, is to be understood as by other *evidence*; and not by other *jurors*." *Kelham* and *Umfreville*, however, misunderstood *Britton's* language. In support of his

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construction of it, *Kelham* refers, in the margin, to the same passage in the *Mirror* (c. 1, §. 13); which, however, contains nothing bearing on the question; and also to *Fleta*, p. 37, §. 3, (ed. by *Selden*), which is as follows; “Et factâ inquisitione semel vel pluries, quotquot indictaverint, statim capiantur si inveniri possunt, augere enim poterit quilibet coronator suas irrotulationes, minuere autem nequaquam.” This passage is against *Umfreville’s* construction of *Britton*; for by an “inquisition taken once or several times” *Fleta* must mean several inquisitions, not several adjournments of one inquisition. [*Crompton* J. If the coroner has jurisdiction, mero motu, to hold a second inquest, what necessity is there for an application for a melius inquirendum in any case?] The object of that writ was to insure a full inquiry in cases where the coroner malè se gessit. It ordinarily went to the sheriff, not, except by leave of the Court, to the coroner. The passage cited by the other side, on moving for the rule, from 2 *Hale*, *P. C.*, pp. 58, 59, does not go to the extent of laying down that in no case can a coroner take a second inquest, unless the first was taken without a view of the body. Supposing, however, that such was *Hale’s* opinion, the case of the double inquest on Serjeant *Jenney’s* servant, which he cites in support of it, does not bear him out. There are two reports of that case (*Yearb. 2 Ric. 3.*, fol. 2, and *Yearb. 21 Edw. 4.*, fol. 70); and there is nothing in either of them to shew that the first inquest was not super visum corporis. On the contrary, the report in *Yearb. 2 Ric. 3.*, fol. 2, which is as follows, states that it was so. ‘Anno vicesimo E. 4, quidam serviens *Will’ Jenney* servientis ad legem, interfectus fuit per quendam *R. Petit* in Com. *Suff.*, et

postea super visum corporis idem *R. Petit* indictus fuit coram coronatore, per nomen *R. Petit* de tali villâ vagabund', ut principalis murdrator cum aliis accessoriis, et postea coronator præceperit corpus interfecti sepeliri. Et postea idem *Will' Jenney* videns illud indictamentum insufficiens fieri, fecit dictum coronatorem et alios coronatores ejusdem comitatus iterum effodire extra terram interfectum xiv. dies sepultum, et indictaverunt iterum eundem *R. Petit* sufficienter cum aliis accessoriis, videlicet *W. Wingfeld* armig. et alios (a), et super hoc gravis clamor venit ad regem et quod esset contra legem, et propter hoc omnes justitiiarii associati in camerâ scaccarii concordaverunt quod coronatores benè fecerunt."

There is nothing in *Yearb.* 21 *Edw.* 4. 70., inconsistent with this statement of the facts. So far, therefore, from the case supporting the opinion attributed by the other side to *Hale*, it is a direct authority the other way. [*Crompton J.* It appears from the report that the first inquest was insufficient; and that inquest must have been void in point of form at least. Possibly the inquisition did not purport on its face to be drawn up super visum corporis. *Cockburn C. J.* If two inquests may be held and two conflicting verdicts returned, what is to determine which of the two findings is to be tried at the Assizes?] The last in point of time should be tried; as was done in the case in the *Yearbooks*. Lastly, assuming that the second inquest ought not to have been held, having been held it is valid. In *Rex v. Bonny* (b) the Court refused to disturb a second inquest taken upon view of a body which was disinterred for the purpose after having been buried more than a year; a previous inquest upon

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(a) *Sie.*(b) *Carth.* 72.

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it having been then quashed. Upon a motion being made, after the second inquest, and more than two years from the death, for a melius inquirendum, the Court said that although that proceeding, rather than a second inquest, would have been proper, considering the length of time that the body had been buried, yet factum valet quod fieri non debet. [*Cockburn C. J.* I am disposed to think that, in the case cited from the *Yearbooks*, the first indictment had been quashed before the second inquest was held.] There is no trace of that in the reports. No Court appears to have interfered; but Serjeant *Jenney* was the only person who procured the coroners to hold the second inquest. In the present case the coroner is simply desirous of doing what the Court thinks right. It must be admitted there is no decision upon the subject except that which has been cited; nor have any precedents but those mentioned in the coroner's affidavit been discovered.

C. R. Kennedy, in support of the rule, was not called upon.

COCKBURN C. J. We are all of opinion that this rule must be made absolute. We have the authority of Lord *Hale* and the uniform course of practice in support of the proposition, that a coroner cannot hold a second inquest while the first is existing. If the coroner were allowed, mero motu, to hold two inquests, the greatest inconvenience might arise from the inconsistent findings of the respective juries. In holding an inquest, the coroner performs a judicial duty, and he is functus officio as soon as the verdict has been returned. He can hold no second inquest in the same case unless

the first has been quashed by this Court; nor can he inquire any further unless a melius inquirendum has been awarded.

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WIGHTMAN, CROMPTON and BLACKBURN Js. concurred.

Rule absolute (a).

(a) The rule was drawn up for a certiorari to bring up the inquisition of 21st May; and, by consent, that the said inquisition, when returned, be quashed.

END OF TRINITY TERM.

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CASES

ARGUED AND DETERMINED

IN

TRINITY VACATION,

XXIII. & XXIV. VICTORIA.

The Judges of the Court of Queen's Bench who sat in
Banc in this Vacation were:

WIGHTMAN J.	HILL J.
CROMPTON J.	BLACKBURN J.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

Thursday,
June 14th.

The QUEEN, on the prosecution of HANS RING-
LAND, *against* The BURSLEM Local Board of
Health.

[Reported, 1 *E. & E.* 1088.]

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

Thursday,
June 14th.

PERRINS *against* The MARINE AND GENERAL
TRAVELLERS' Insurance Company.

[Reported, 2 *E. & E.* 324.]

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IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

JOHN CLARK *against* The QUEEN.*Thursday,*
June 14th.

ERROR by the defendant to reverse the judgment against him on an information in the nature of a writ of quo warranto. The venue in the margin of the information was *South Lancashire*; and the information called upon the defendant to shew by what authority he claimed to exercise the office of councillor of one of the wards of the borough of *Liverpool*. The defendant traversed that he exercised the office of councillor, or claimed to be councillor. Issue was joined thereon. Then followed on the record a suggestion by the Court of Queen's Bench that the trial of the above issue could be more conveniently had in the county of *Middlesex*, and therefore, according to the statute in such case made and provided, that a jury of the said county of *Middlesex &c.* The record, further, shewed that the case was tried in *Middlesex* by a jury of that county, who found the defendant guilty, and judgment of ouster was accordingly entered. Error was assigned, on the ground that the case was tried before a *Middlesex* jury, and not before a jury of the county or place where the venue was laid; and that no law warranted the trial of the issue by such a jury, on the suggestion that the trial could be more conveniently had in *Middlesex* than in *Lancashire*.

The Court has power to change the venue in an information in the nature of a quo warranto: and a suggestion on the record, that the trial of the issue can be more conveniently had in the county of the substituted venue, shews sufficient ground for the change, and for the subsequent proceedings in that county.

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Tuesday,
April 24th.
Friday,
May 4th.
Thursday,
June 14th.

HODGSON and others *against* HOOPER and others.

EJECTMENT brought, by writ dated 16th *February*, On 21st *August*, 1781,
1859, by the plaintiffs, the churchwardens and the lord of a
manor, with
the consent

of certain of the tenants, granted to five persons, two of whom were the churchwardens and overseers of the parish of *M.*, license to enclose 3 a. 2 r. of the waste of the manor; and that they and their heirs, and all persons claiming under them, should and might lawfully hold the same, so enclosed, in trust for the purpose of building a workhouse for the poor of *M.*; rendering to the then lord and to all other lords of the manor the yearly rent of 5s. for the same in every year for ever. This grant was not according to any custom in the manor, nor was there any such custom. The churchwardens and overseers of *M.* immediately took possession of the land the subject of the grant, and built on it a workhouse which, up to *Midsummer*, 1838, was used as such; and possession of the workhouse and land was retained by the churchwardens and overseers, or persons claiming through them, from 1781 to 1840, when they were surrendered to the then lord of the manor, as hereafter mentioned. In 1817, the churchwardens and overseers of *M.* also took possession of 2 r. 10 p. of land, contiguous to that granted in 1781; and retained possession of this additional land also from 1817 to 1840. The five persons nominated as trustees of the original land by the grant of 1781 all died before 1817, and no heir of the survivor came in to claim admittance to it, after due proclamations in the manor Court calling upon him to do so. In *October*, 1835, the then steward of the manor gave notice to the churchwardens of *M.* to nominate other trustees in the stead of those deceased, in order to their admittance at the next manor Court, to save a forfeiture. In compliance, the vestry of the parish nominated seven fresh trustees, who, on 27th *October*, 1835, were admitted to both pieces of land at a manor Court; the parish paying a fine to the lord and the lord granting the land to the seven persons and their heirs, to hold by copy of court roll and at the will of the lord, on the same trusts as in the grant of 1781, and at the same yearly rent of 5s. From the accounts of a deceased steward of the manor, it appeared that this rent was paid to the lord from 1781 to 1791, and from the parish books of *M.* it appeared that it was also paid from 1825 to 1836. In *January*, 1840, the vestry of *M.* passed a resolution that, there being no further use for the premises as a workhouse, the land should be forthwith surrendered to the then lord of the manor by the churchwardens and overseers, and the trustees appointed in 1835. And in *February*, 1840, that surrender was made to the then lord of the manor, the surrender comprising, in terms, the first piece of land only, but possession being given to the lord, not of it only, but also of the other. The lord, by himself or by persons claiming under him, held undisturbed possession of both pieces of land from *February*, 1840, to the time of the present action.

On a case stated, in an action of ejectment brought, on 16th *February*, 1859, by the churchwardens and overseers of *M.*, to recover both pieces of land from defendants, who were in possession and claimed under the lord of the manor of 1840, power being reserved to the Court to draw inferences of fact: Held, that plaintiffs were not entitled to recover either piece of land. As to the original piece, that the possession by plaintiffs under the grant of 1781 was at the outset permissive, and had not, down to and at the time of the passing of stat. 3 & 4 *W. 4. c. 27.* (*July*, 1833), become adverse; plaintiffs having, from 1781 down to that time, held either as tenants at will or, at most, as tenants from year to year of the lord. That such tenancy was determined by the admittance of the fresh trustees for *M.* in *October*, 1835, whereby, within five years from the passing of stat. 3 & 4 *W. 4. c. 27.*, a fresh tenancy at will was created: which last tenancy was, within twenty-one years of its inception, namely, in 1840, determined by the lord's entry and

1860. *Brett*, for the defendant (a). There has been a mis-trial. The venue was local, and the Court below had no power to change it to *Middlesex* on the mere suggestion that the trial could be more conveniently had there; though possibly, had the suggestion been that a fair trial could not be had in *South Lancashire*, the venue might have been changed. A proceeding by quo warranto is not an "action" within the purview of stat. 3 & 4 *W. 4. c. 42. s. 22.*, which empowers the Court to change the venue in local actions: and stat. 6 & 7 *Vict. c. 89.*, under sect. 5 of which the Court may order the venue in proceedings by way of quo warranto to be laid in *Middlesex* in the first instance, contains no provision for the change to that county of a venue originally laid elsewhere. The case therefore falls within the old statute of quo warranto, 18 *Edw. 1, stat. 2.*, by sect. 2 of which the venue must be local and the case tried in its own shire. [*Williams J.* The old writ of quo warranto is now obsolete.] Although that is so, it is laid down in *Corner's Crown Practice*, p. 179, that the same incidents apply to the substituted proceeding by information in the nature of a quo warranto.

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Milward, contra, was not called upon.

WILLIAMS J. We think that the Court of Queen's Bench had power to change the venue, and that there has been no mis-trial.

WILLES and BYLES Js. and MARTIN and CHANNELL Bs. concurred.

Judgment affirmed.

(a) Before *Williams*, *Willes* and *Byles* Js.; *Martin* and *Channell* Bs.

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Tuesday,
April 24th.
Friday,
May 4th.
Thursday,
June 14th.

HODGSON and others *against* HOOPER and others.

EJECTMENT brought, by writ dated 16th *February*, 1859, by the plaintiffs, the churchwardens and

On 21st *August*, 1781,
the lord of a
manor, with
the consent

of certain of the tenants, granted to five persons, two of whom were the churchwardens and overseers of the parish of *M.*, license to enclose 3 a. 2 r. of the waste of the manor; and that they and their heirs, and all persons claiming under them, should and might lawfully hold the same, so enclosed, in trust for the purpose of building a workhouse for the poor of *M.*; rendering to the then lord and to all other lords of the manor the yearly rent of 5s. for the same in every year for ever. This grant was not according to any custom in the manor, nor was there any such custom. The churchwardens and overseers of *M.* immediately took possession of the land the subject of the grant, and built on it a workhouse which, up to *Midsummer*, 1838, was used as such; and possession of the workhouse and land was retained by the churchwardens and overseers, or persons claiming through them, from 1781 to 1840, when they were surrendered to the then lord of the manor, as hereafter mentioned. In 1817, the churchwardens and overseers of *M.* also took possession of 2 r. 10 p. of land, contiguous to that granted in 1781; and retained possession of this additional land also from 1817 to 1840. The five persons nominated as trustees of the original land by the grant of 1781 all died before 1817, and no heir of the survivor came in to claim admittance to it, after due proclamations in the manor Court calling upon him to do so. In *October*, 1835, the then steward of the manor gave notice to the churchwardens of *M.* to nominate other trustees in the stead of those deceased, in order to their admittance at the next manor Court, to save a forfeiture. In compliance, the vestry of the parish nominated seven fresh trustees, who, on 27th *October*, 1835, were admitted to both pieces of land at a manor Court; the parish paying a fine to the lord and the lord granting the land to the seven persons and their heirs, to hold by copy of court roll and at the will of the lord, on the same trusts as in the grant of 1781, and at the same yearly rent of 5s. From the accounts of a deceased steward of the manor, it appeared that this rent was paid to the lord from 1781 to 1791, and from the parish books of *M.* it appeared that it was also paid from 1825 to 1836. In *January*, 1840, the vestry of *M.* passed a resolution that, there being no further use for the premises as a workhouse, the land should be forthwith surrendered to the then lord of the manor by the churchwardens and overseers, and the trustees appointed in 1835. And in *February*, 1840, that surrender was made to the then lord of the manor, the surrender comprising, in terms, the first piece of land only, but possession being given to the lord, not of it only, but also of the other. The lord, by himself or by persons claiming under him, held undisturbed possession of both pieces of land from *February*, 1840, to the time of the present action.

On a case stated, in an action of ejectment brought, on 16th *February*, 1859, by the churchwardens and overseers of *M.*, to recover both pieces of land from defendants, who were in possession and claimed under the lord of the manor of 1840, power being reserved to the Court to draw inferences of fact: Held, that plaintiffs were not entitled to recover either piece of land. As to the original piece, that the possession by plaintiffs under the grant of 1781 was at the outset permissive, and had not, down to and at the time of the passing of stat. 3 & 4 *W. 4. c. 27.* (*July*, 1833), become adverse; plaintiffs having, from 1781 down to that time, held either as tenants at will or, at most, as tenants from year to year of the lord. That such tenancy was determined by the admittance of the fresh trustees for *M.* in *October*, 1835, whereby, within five years from the passing of stat. 3 & 4 *W. 4. c. 27.*, a fresh tenancy at will was created: which last tenancy was, within twenty-one years of its inception, namely, in 1840, determined by the lord's entry and

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resumption of possession. As to the piece of land taken possession of by plaintiffs in 1817: That the lord's right of entry to it could not be barred before 1837, before which, namely, in 1835, it was included in the land to which the fresh trustees were admitted; as it was, in 1840, in the land of which the lord retook possession.

overseers of the parish of *Mitcham*, for the recovery from the defendants of a piece of land containing four acres and ten perches, or thereabouts, situate in that parish, on the north side of *Mitcham Common*; together with the messuage or tenement and the out-offices and buildings thereon, lately erected as a workhouse for the poor of the said parish of *Mitcham*, and for a garden or orchard for the further accommodation of the said poor, and such other buildings as are now standing thereon, and which premises are now used as an india-rubber manufactory, with the appurtenances.

The following case was afterwards stated by consent.

1. There are either appendant to, or forming part of, or included in, the manor of *Biggin and Tamworth*, in the county of *Surrey*, large commons, or commonable waste lands, of which the premises sought to be recovered formed part prior to 1781.

2. On 21st *August*, 1781, the lady of the manor of *Biggin and Tamworth*, by the consent in writing of eighteen persons, tenants of the manor, granted unto *Foster Reynolds, John Swain, John Chesterman, Joseph Sibley* and *James Galpin*, license to inclose a piece of land, parcel of the common or waste belonging to the said manor, called *Mitcham Common*, containing three acres and two roods (being part of the land sought to be recovered), as the same were then staked out; and that they and their heirs, and all persons claiming under them, should and might lawfully hold the same, so inclosed, in trust for the purpose of erecting and building a workhouse for the poor of the said parish of *Mitcham*, and for a garden and orchard for the further accommodation and benefit of the said poor; rendering to the lady of the said manor, and all other lords or ladies,

lord or lady, of the said manor, the yearly rent of 5s. for the same in every year for ever. The consent and grant are entered on the court rolls of the manor, but the grant was not according to any custom of the manor; and there never was any custom of the manor for the lord or lady of the manor to grant, alien, or convey any part of the common or waste lands of or belonging to the manor, in the manner in which the waste land comprised in the grant of 21st *August*, 1781, was, or purported to be, granted or conveyed.

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3. *John Chesterman* and *Joseph Sibley* were the then churchwardens and overseers of the parish.

4. The churchwardens and overseers of the parish, from 1781, entered into possession of the land and premises; and a poor-house or workhouse was duly erected at the expense of the parish upon the piece of land, and the workhouse and land were thenceforth used, and possession thereof had, by the churchwardens and overseers of the parish, for the accommodation and benefit of the poor thereof, until 1838.

5. Up to and including the year 1836, the workhouse was used by the churchwardens and overseers of the parish of *Mitcham*. Subsequently to the year 1836, and by virtue of the Poor Law Acts, the parish of *Mitcham* was included with other parishes in the *Croydon* Union, and the workhouse was from time to time used by the guardians of the *Croydon* Union, constituted under the said Acts, for the reception of the poor of the parish of *Mitcham*, until *Midsummer*, 1838. The guardians of the poor of the said Union paid to the churchwardens and overseers of *Mitcham* the annual rent of 105*l.*, in respect of such workhouse, up to *Midsummer*, 1838, and up to that time the churchwardens and overseers kept the workhouse in repair, and disposed of the fruit or

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produce of the garden and orchard, and annually accounted to the vestry of the parish in respect of the rent and produce. In the year 1838, the use of the workhouse as a workhouse was abandoned, but the churchwardens and overseers of the said parish retained possession of the land and premises, sold the produce of the land, and accounted for the sums realized by such sale in their accounts as such churchwardens and overseers, until *February*, 1840.

6. In the year 1817, the churchwardens and overseers of the said parish took possession of two roods ten perches of land, parcel of the said *Mitcham Common* (the remaining portion of the land sought to be recovered), and inclosed the same, and held possession of and used and enjoyed the same, with the residue, for the benefit of the poor, until 1838; and from thence till *February*, 1840, they sold the produce thereof, and applied the proceeds, in manner mentioned with respect to the residue of the land.

7. Previously to 6th *August*, 1817, all the persons originally nominated trustees of the said piece of ground and premises, containing three acres and two roods, had died; and it appears on the rolls of the manor that the homage presented to a court baron, holden on 21st *May*, 1834, the deaths of the said trustees, and that it was not known who was the survivor or the heir of the survivor; and there is also an entry on the court rolls, and the fact is, that thereupon three several proclamations were made, according to the custom of the manor, for the heir of the surviving trustee, or any other person claiming title to the said premises, to come in and be admitted; and that the last of such proclamations was made on 27th *October*, 1835; and that, default having been made, the bailiff of the manor was ordered to

seize the land as forfeited to the lord. Such proclamations and default were duly enrolled.

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8. On 10th *October*, 1835, the steward of the manor wrote and sent the following letter to the churchwardens of *Mitcham*.

" 6 *Harpur Street, Red Lion Square*,
10th *October*, 1835.

" Gentlemen,

" I beg to inform you that a general court baron for the manor of *Biggin and Tamworth* will be held at the *Swan Inn, Mitcham*, 'on *Tuesday* the 27th instant, at 12 o'clock at noon; and as all the gentlemen who were admitted tenants of the manor for the land upon which the workhouse is erected are dead, it is necessary the parish should nominate others in their stead, in order that they may be admitted at the next court, to save a forfeiture of the estate. I shall therefore be obliged by hearing from you upon the subject at your earliest convenience.

" I am, &c.

" *J. E. Penfold*,

" To the churchwardens,

" Steward."

" *Mitcham, Surrey*."

9. In the parish books of *Mitcham* there is an entry, dated 22nd *October*, 1835, to the following effect. "At a vestry held this day, pursuant to public notice given in the church on *Sunday* last, for taking into consideration a notice received by the churchwardens from the steward of the manor of *Biggin and Tamworth*, to nominate tenants for the land on which the workhouse is erected, in the stead of those who are deceased, and other business; Resolved, 'That the following eight gentlemen, being nominated, be requested to take upon

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themselves the execution of the trust, with the understanding that the expenses consequent thereon should be paid by the overseers of the poor of this parish.”

10. The overseers of the parish paid to the then lord of the manor, or his steward, the sum of 79*l.* 17*s.* 6*d.*, as and by way of fine in respect of the admission of seven of the above mentioned eight persons (the vicar not being admitted); and there is on the rolls of the manor an entry, that at a special court baron, holden on 27th *October*, 1835, after reciting the grant of 21st *August*, 1781, and that the said *Foster Reynolds* and the four other persons inclosed the piece of land whereon the churchwardens and overseers erected the workhouse, and converted the remainder into a garden and orchard as aforesaid; and after reciting the proclamations and forfeiture, and that the lord had remitted the escheats and forfeiture; the lord granted to the said seven persons the said piece of land and premises, to hold unto them and the survivor and survivors of them, and the heirs and assigns of such survivor, of the lord of the manor, by the rod and by copy of court roll, at the will of the lord, according to the custom of the manor, in trust for the inhabitants of the parish of *Mitcham*, and to be surrendered and disposed of as they should, from time to time, in public vestry assembled, or otherwise, direct or appoint, so as the aforesaid customary hereditaments and premises should be for ever thereafter used as a workhouse for the poor of the parish of *Mitcham*, and for no other purpose; yielding and paying the rent of 5*s.* a year, and a heriot, on the death of every tenant, of 2*l.* 2*s.*, and a fine at will on the death or alienation of a tenant; and doing fealty, suit of court, and performing such other services as the customary tenants of the manor

do or ought to perform. And such seven persons were then admitted tenants in manner and form aforesaid, and the fine for their admission was set at 79*l.* 17*s.* 6*d.*, and their fealty was respited.

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11. It appears, from the accounts of a deceased steward of the manor, that the yearly rent of 5*s.*, reserved by the grant of 21st *August*, 1781, was paid to the lord from 1781 to 1791, and, from the books of the churchwardens and overseers of the parish, that it was paid to the lord from the year 1825 to 25th *March*, 1836.

12. The guardians of the poor of the *Croydon* Union, on 8th *May*, 1838, sent to the churchwardens and overseers of *Mitcham* a notice in writing, under their common seal, of their intention to deliver up to them, on the 24th *June* then next, possession of the workhouse and gardens, land and appurtenances thereto belonging, which they then held of them. The workhouse was, at the same time, abandoned by the guardians, and possession thereof was delivered up to the churchwardens and overseers of *Mitcham*.

13. At a meeting of the vestry of the parish of *Mitcham*, held on 23rd *January*, 1840, a resolution was passed for surrendering the said piece of ground and the workhouse and premises which had been erected thereon by the parish, into the hands of the then lord of the manor; which resolution was to the following tenor and effect. "At a vestry, assembled under public notice given as the law requires for that purpose, to take into consideration the expediency of surrendering and disposing of the premises on *Mitcham Common*, lately used as and for the workhouse of this parish, and to give directions to the churchwardens and overseers of the poor, and the trustees, and all other persons in whom

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such premises are now vested, to surrender and dispose of the same accordingly, *Edward Walmsley, Esq.*, churchwarden, in the chair; present, Messrs. *James Bridger*, churchwarden" (now lord of the manor and one of the now defendants), "*John Glover* and *John Searle*, overseers, *John Holden* and *Charles Aspery*, guardians, and" nineteen other vestrymen: "Whereas, it appearing to this vestry that the guardians of the *Croydon Union* have, ever since *Midsummer*, 1838, formally abandoned and delivered up possession to the churchwardens and overseers of the poor of this parish the premises on *Mitcham Common*, which had been for many years and up to that period used as a workhouse for the poor of this parish, and that such premises are now no longer used or required as such workhouse; and it appearing also to this vestry that the parish has ever since sustained a considerable annual expense by keeping a proper person to protect the said premises; and it further appearing to this vestry that the purpose and object for which the said premises were granted to certain trustees for the benefit of the parish by the lord of the manor, of whom such premises were holden, have now ceased, and that such trustees are liable to pay to the lord of the manor a yearly quit rent, and to keep the premises in repair; It is unanimously resolved and agreed, that it is expedient and for the benefit of this parish that the hereditaments and premises heretofore used as a workhouse for the poor of this parish be surrendered to the lord of the manor of whom the same are holden, by the churchwardens and overseers of the poor, and by the trustees of the same, and by all such other persons as may be considered necessary to effect a legal surrender of the said premises. And this vestry do

hereby accordingly authorize and empower, direct and appoint, the churchwardens and overseers of this parish and the seven persons" (naming them) "to whom the said premises were granted in trust for the inhabitants of this parish, and to be surrendered and disposed of as they should from time to time, in public vestry assembled, or otherwise, legally direct and appoint, so as the said premises should be for ever after used as a workhouse for the poor of this parish, and for no other purpose, to surrender the same premises into the hands of the lord of the manor in such way as may be considered necessary, in order to relieve this parish and the trustees from all further expense and liability."

14. A copy of this resolution was forwarded to *James Moore, Esq.*, the then lord of the manor, with a letter expressing the readiness of the parish officers to "execute it."

15. It appears, by an entry on the court roll, that, in pursuance of the resolution, the then trustees of the piece of land, workhouse and premises, and the churchwardens and overseers of the parish, surrendered the same into the hands of the lord, according to the custom of the manor; and by a surrender-note under seal, taken out of court by the steward of the manor, on 16th *February*, 1840, and signed by the trustees, therein described as customary tenants of the manor, and by the overseers and churchwardens, described as such, those parties, in pursuance of the direction of the vestry meeting of the inhabitants of the parish of *Mitcham*, contained in the above resolution, surrendered by the rod into the hands of the lord, according to the custom of the manor, the said piece or parcel of customary land, containing 3 a 2 r., together with the messuage or premises for

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1860. many years and until then lately used as a workhouse,
HODGSON &c., to which said customary hereditaments the said
v. trustees were admitted tenants at the said special court
HOOPER. baron holden on 27th *October*, 1835; to the intent that
the lord might do therewith his will.

16. The Poor Law Board, for the time being, were no parties to these surrenders, or either of them. According to the course of business of the Poor Law Board, if any application for their consent to or with respect to such surrenders had been made to them, such application and the consent thereto, if any, would have been entered on the register for the time being of their correspondence, which register is now in existence. On searching such register it is found that no such application or consent is contained therein, nor is there any trace among the documents of the Poor Law Board of such application having been made or consent given.

17. Immediately after the aforesaid surrender of the 3 a. 2 r. had been made, and on the same 18th *February*, 1840, one churchwarden and one overseer of the poor of the parish accompanied the bailiff of the manor on to the said 2 r. 10 p., and delivered up the possession thereof to the bailiff. One churchwarden and one overseer were appointed and delegated by the two churchwardens and three overseers of the poor of the said parish to deliver up possession as aforesaid, as their joint act and on their behalf, and such possession was so delivered up accordingly.

18. *James Moore*, as the lord of the said manor, thereupon entered into and took possession of all the lands and premises, containing 4 a. 0 r. 10 p. *James Moore* was, and continued to be, from the year 1803 up to the time of his death, which happened in *February*, 1851,

the lord of the manor; and the defendant *James Bridger* became lord of the manor in 1857.

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19. The defendants claim all and every the said lands through the said *James Moore*.

20. The license of 21st *August*, 1781, and the grant of 27th *October*, 1835, were neither of them executed in the presence of two or more credible witnesses, or enrolled in the High Court of Chancery within six calendar months after the execution thereof, and the license was not made for a full and valuable consideration actually paid at or before the making of such license. The said 2 r. 10 p. of waste land was not, nor was any part thereof, assured by deed, executed in the presence of two or more credible witnesses, and enrolled in the High Court of Chancery.

The questions for the opinion of the Court were, First; whether, at the time of the surrender, in *February*, 1840, the churchwardens and overseers of *Mitcham* had any and what estate or interest in the premises, or any part thereof. Secondly; whether, at the commencement of this action, the churchwardens and overseers were entitled to the possession of the land and premises, or any part thereof, on behalf of the parish.

If the answer to the two questions were in the affirmative, in respect of any part thereof, then judgment was to be entered for the plaintiffs for so much. If, in the negative, then judgment was to be entered for the defendants.

The Court was to be at liberty to draw such inferences from the facts stated as a jury might have drawn.

Lush, for the plaintiffs. In *July*, 1833, when stat. 3 & 4

1860. *W. 4. c. 27.*, was passed, the possession by the parish officers of *Mitcham* of the lands and premises in dispute was adverse, and had been so for more than the twenty years immediately preceding; they therefore, by reason of that statute, then acquired the fee, and nothing has since taken place to divest them of their freehold estate. The grant by the lady of the manor, in 1781, of the license to inclose part of the waste, in consideration of an annual payment of 5*s.* by the licensees, was in effect a grant of the fee; the 5*s.* being reserved as a quit rent, according to the ancient practice upon grants of freeholds by lords of manors, not as a rent service, which of course could not be reserved upon the grant of a fee. Although, strictly speaking, a fee could not pass by grant, but only by a feoffment, or by deeds of lease and release, the Court is at liberty at this distance of time to presume that there was such a proceeding as would pass the fee and thus effectuate the intention of the parties. [*Blackburn J.* What was their intention? May it not have been to make the land a copyhold?] That cannot have been meant; for it does not appear that the licensees were to hold the land at the will of the lord, or according to the custom of the manor; or that there was any custom in the manor for the lord to grant parcels of the waste as copyhold; or that the licensees were admitted in the manor Court, or paid any fine. All the incidents of copyhold tenure were therefore wanting. On the contrary, the limitation in the grant to the licensees and their heirs, in consideration of the annual payment of 5*s.* to the lord for ever, shews an intention that the licensees should have the land for ever, and the lord the rent. [*Blackburn J.* The grant expresses that the rent is to be annexed to the lordship

of the manor; this would evidence an intention, which, however, could not be legally carried out, to create a perpetual tenure of the land by the licensees from the lord. *Cockburn C. J.* How can there be an adverse holding of land for which the holder pays a rent? The holding would, certainly, not be adverse, if the rent was paid as a rent-service or an acknowledgment of tenure; but, here, it was not so. It appears from the grant that the lady of the manor retained no reversion; but, as is said by *Littleton*, sect. 215 (*Co. Litt.* 142. b.), "Where a man upon" "a gift or lease will reserve to him a rent-service, it behoveth, that the reversion of the lands and tenements be in the donor or lessor." The licensees were to hold the land, not as tenants, but as owners. Their possession was therefore adverse, within the rules laid down in the notes to *Nepean v. Doe* (a), as follows: "Whenever the question arose" (*i. e.*, before stat. 3 & 4 W. 4. c. 27.) "whether a particular claimant was barred by having been twenty years out of possession, the mode of solving this question was by considering whether he had been out of possession under such circumstances as had reduced his interest to a *right of entry*; for, if he had, then, as that right of entry would be barred by stat. 21 Jac. 1. (b) at the end of twenty years, the possession during the intermediate time was adverse to him. Now, in order to determine whether the claimant had been out of possession under circumstances which would turn his estate to a right of entry, it was necessary to inquire in what manner the person who had been in the possession during that time held. See *Reading v. Royston*, *Salk.* 423. If he held in a

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(a) 2 *Smith's L. C.* p. 579. (ed. 5.)

(b) Cap. 16.

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character incompatible with the idea that the freehold remained vested in the claimant, then, as the case would arrange itself under some one of the heads *disseisin*, *abatement*, *discontinuance*, *deforcement*, or *intrusion*, all of which expressed at common law different modes of substituting a freeholder by wrong for one by right, so as to make the new comer tenant to the lord and to a stranger's *præcipe*, see 1 *Roll.* 659, &c.; *Co. Litt.* 277," "it followed that the possession in such character was *adverse*. But it was otherwise if he held in a character compatible with the claimant's title. And, in order to ascertain in what character the person in possession held, the Court would look at his conduct while in possession." "It is therefore apprehended that at the time of the enactment of 3 & 4 *W. 4. c.* 27., the question whether possession was or was not adverse, was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold in the claimant." The question in the present case, therefore, is, whether or not the parish officers representing the licensees under the grant of 1781, held in a character compatible with the defendants' title. And they clearly did not; for, whether or not that grant was effectual to pass the fee, the intention was that the fee should pass by it, and the yearly payment of 5*s.* must be taken to have been made with reference to this intention, not as a rent-service, but as a rent seck. [Cockburn C. J. Suppose that the intention was to convey the fee, but that the deed of grant was insufficient to pass the fee. Would not the result be that the grantees became tenants at will? No. *Taylor v. Horde* (a) shews that

(a) 1 *Burr.* 60.

after twenty years' possession they would gain a title. In the same way, a tenant, who enters under a void lease which passes no interest to him, gains a title to the fee, after twenty years' possession without payment of rent; *Doe d. Lansdell v. Gower* (a). And possession, gained without committing a disseisin, begins to be adverse as soon as the person so in possession ceases to have a right to the possession; *Doe d. Parker v. Gregory* (b). If, therefore, the grant in the present case in 1781 passed no title, possession under it for twenty years from that date was adverse, and has now given the plaintiffs a title to the fee, by reason of stat. 3 & 4 W. 4. c. 27. ss. 2 and 3. Assuming, however, that the plaintiffs, at the time that Act passed, were in possession merely as tenants at will, sects. 7 and 15 shew that the lord was, in that case, bound to enter or bring his action within five years from that period. Sect. 7, which is clearly retrospective, enacts, "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." And sect. 15, "That when no acknowledgment" of the title of the person entitled to land or rent, "shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the

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(a) 17 Q. B. 589.

(b) 2 A. & E. 14.

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rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this Act." The lord of the manor having failed to enter or bring an action within five years from *July*, 1833, when the Act passed, the plaintiffs' title became indefeasible at the end of that period; *Doe d. Dayman v. Moore (a)*. Assuming that the admittance by the lord, in *October*, 1835, of the nominees of the parish, under the mistaken impression on both sides that the land was copyhold, was a determination of the tenancy at will, that was not sufficient of itself to give the lord a title; he ought to have made an entry or brought an action within the five years next after *July*, 1833. As he did not do so, the plaintiffs, in any view of the case, acquired a freehold title in *July*, 1838, which could not be divested by the surrender in 1840 to the lord. Whether, therefore, the plaintiffs, in 1833, had acquired the fee by adverse possession, or were then tenants at will of the lord, they are entitled to the judgment of the Court.

Bovill, contra. First: This action was brought in 1859, and for more than the twenty years last immediately preceding, namely, from the year 1835, the lord of the manor has been in undisputed possession of the premises. In that year, at all events, if not

(a) 9 Q. B. 555.

before, the nominees of the parish became either tenants to the lord or grantees of a copyhold estate, which they surrendered to him in 1840. Within the twenty years immediately before action, therefore, there has been no possession adverse to the lord. Secondly: If it is necessary to shew an earlier title in the lord, the evidence to be collected from the facts stated in the case is wholly inconsistent with the presumption, suggested by the other side, that the intention of the parties to the grant of 1781 was to pass the fee to the then grantees. From that year to the present, there is no evidence of any belief on the part of the parish that they held in fee, or of any intention on their part to dispute the lord's right to the fee. The reservation of the 5*s.* annual rent was itself an admission that the lord retained the fee, and the whole circumstances of the case are inconsistent with there having been any adverse possession by the parish or dispossession of the lord; and shew, rather, that the parish were tenants at will, or at most from year to year, to the lord, at the time when stat. 3 & 4 *W.* 4. c. 27. passed. If so, that tenancy was determined and a fresh tenancy at will created in 1835, being within five years from the passing of the Act, by the admittance to the land, by the lord, of fresh trustees for the parish. Moreover, the case finds that the 5*s.* rent was paid regularly from 1781 to 1791, and again from 1825 to 1836. The Court has power to draw inferences of fact, and will be warranted in inferring that the rent was regularly paid, also, in the years between 1791 and 1825. If that be so, the possession did not commence to be adverse, as against the lord, until 1836, when the payment of rent was first discontinued; and long before twenty years had elapsed

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Lush, in reply. No answer has been given to the first branch of the argument for the plaintiffs. Even supposing that the Court draw the inference that the 5s. was paid yearly to the lord from 1781 to 1836 without interruption; the question remains, *quo intuitu* was the payment made? It is clear from the case that the payment was not intended by the parties to the grant of 1781 to be a payment of rent, in the sense of rent-service, reserved upon a tenancy to the lord as an acknowledgment of his title; but that the holding by the grantees was quite incompatible with the notion that the fee remained in the lord. [*Blackburn J.* Conceding that the intention was that the fee should pass by the grant, the grant was, nevertheless, insufficient to pass it. Did not the grantees, therefore, when let into possession, become tenants at will to the lord according to the law as stated by *Parke B.* in delivering the judgment of the Court in *Doe d. Gray v. Stanion* (b), where he says: "There is no doubt but that if there be an agreement to purchase, and the intended purchaser is *thereupon let into possession*, such possession is lawful, and amounts at

(a) *Bovill* further argued that the plaintiffs could have acquired no title, because they did not shew a conveyance of the land to them, enrolled under the Statute of Mortmain, 9 G. 2. c. 36.; and that stat. 7 & 8 Vict. c. 101. s. 73., which enacts that conveyances of lands to parish officers for the purpose of providing workhouses, shall be good and valid though not enrolled pursuant to stat. 9 G. 2. c. 36., did not apply to a case like the present, in which there was no ground for presuming any conveyance at all. The argument on this point is however omitted, as it was not noticed by the Court.

(b) 1 M. & W. 695. 700.

law, strictly speaking, to a bare tenancy at will." "The person suffered so to occupy cannot, on the one hand, be considered as a trespasser when he enters, and on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law."?] A tenancy at will is an ambiguous expression used by the law to describe a holding for an indefinite term, by one whom the landlord can turn out at any time. It may be granted, that if one man lets another into possession of land, on the understanding between them that he who is let into possession shall occupy as long as the other pleases, that is a strict tenancy at will, and possession under it can never be adverse. But if the intention of both parties is, that the person let into possession shall thereby acquire the fee, the possession given in furtherance of that intention is adverse, although in one sense it may be vaguely described as a tenancy at will. [*Hill J.* What difference is there in law between the two?] Perhaps there is no material distinction between them during the currency of twenty years from the commencement of the possession; but when that period has elapsed, it becomes material to consider what was the intention of the parties, in order to determine whether or not the possession was adverse during the twenty years. [*Hill J.* It is laid down, in sect. 70 of *Littleton*, that "if a man should make a deed of feoffment to another of certaine lands, and delivereth to him the deed, but not liverie of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupie it at the will of him which made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him." And Lord *Coke's* comment

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upon this is (a), "Here it appeareth, that if the feoffee doth enter, he is tenant at will, because he entreth (b) by the consent of the feoffor." By that must be meant that the feoffee is not a trespasser, not that he is a tenant at will, strictly speaking. [Blackburn J. In *Doe d. Milburn v. Edgar* (c) the person under whom the defendant claimed was let into possession more than twenty years before action brought, under an agreement to purchase an allotment accruing to the vendor under an Inclosure Act, which provided that a purchaser let into possession of an allotment should have the same rights as the vendor. The person in question had paid interest on a portion of the purchase money for some years, but never completed the purchase. It was held that, even after a lapse of twenty years, his possession was not adverse to the vendor's title. Tindal C. J., in giving judgment, said, "The case has been likened to that of a feoffment without livery of seisin; and it has been urged that, if a party who is let into possession without livery, remain in possession twenty years, the whole period must be deemed an adverse possession on which he may maintain his right." He then cites *Littleton*, sect. 70, and Lord Coke's comment upon it, as showing that this argument was unfounded; adding, that the defendant in the principal case "was let into possession by consent of the owner of the land, and the continued payment of interest imports that he remained there only with the owner's permission." That case seems inconsistent with *Doe d. Lansdell v. Gower* (d). Moreover, in *Doe d. Milburn v. Edgar* (c), the question whether the purchase was completed was left to the jury; and

(a) *Co. Litt.* 57 a.(b) *Sic.*

(c) 2 B. N. C. 498. 502.

(d) 17 Q. B. 589.

the decision of the Court would probably have been different had the finding been the other way. In the present case, if the plaintiffs' possession was adverse, as against the lord, in 1833, when stat. 3 & 4 *W.* 4. c. 27. passed, their title then became absolute. Even if the possession was not then adverse, but was that of tenants at will, the lord did not "make an entry or distress or bring an action to recover" the land, within five years from 1833, as he might have done under sect. 15 of the Act. In the view of the case, therefore, most unfavourable to the plaintiffs, the lord's title became extinguished in 1838, by reason of sect. 34, which provides that, at the end of the period limited by the Act to any person for enforcing his title, such title shall be extinguished (a).

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Cur. adv. vult.

COCKBURN C. J. now delivered the judgment of the Court.

This was an action brought by the churchwardens and overseers of the parish of *Mitcham* to recover certain lands and premises of which the defendants are in possession, deriving title from *James Moore*, lord of the manor of *Biggin and Tamworth*, in the county of *Surrey*. The property in dispute was formerly part of the wastes of the manor in question, and, as such, part of the lord's freehold. It appears from the case that, on 21st *August*, 1781, the then lady of the manor, by

(a) *Lush* also argued that the Statute of Mortmain, 9 G. 2. c. 36., had no application to the case; citing *Philpott v. President and Governors of St. George's Hospital*, and others, 6 H. L. Ca. 338, and *President, &c. of the College of St. Mary Magdalen, Oxford, v. The Attorney General*, 6 H. L. Ca. 189. The argument on this point is omitted for the reason stated in note (a), p. 166, *supra*.

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consent of the tenants of the manor, granted to five persons, named, license to inclose three acres and two roods, part of the waste, and that they and their heirs, and all persons claiming under them, should and might lawfully hold the same, so inclosed, in trust for the purpose of erecting and building a workhouse for the poor of the said parish of *Mitcham*, and for a garden and orchard for the further accommodation and benefit of the said poor, rendering to the lady of the said manor, and all other lords or ladies, lord or lady, of the said manor, the yearly rent of *5s.* for the same in every year for ever. The churchwardens and overseers, in the year 1781, entered into possession, and, at the expense of the parish, erected a workhouse, and used and occupied it, up to and including the year 1836, as the workhouse of the parish. It appears, from the accounts of a deceased steward of the manor, that the yearly rent of *5s.*, reserved by the grant, was paid to the lord of the manor, from the year 1781 to the year 1791; and it appears, from the books of the churchwardens and overseers of the parish, that this rent was further paid from the year 1825 to 25th *March*, 1836. We think ourselves warranted to infer that it was paid during the interval between 1791 and 1825. On 10th *October*, 1835, the five persons to whom the license had been granted in 1781 being then dead, notice was given to the officers of the parish, by the steward of the manor, to nominate other persons for the purpose of admission, to save a forfeiture. Seven persons were accordingly nominated and admitted, the parish paying a sum of *79l. 17s. 6d.*, as a fine on their admission. In this proceeding the estate was treated by all parties, but, beyond all question, erroneously, as a copyhold tenement. In 1840, the

parish officers, in conformity with a resolution of the parish in vestry assembled, surrendered and gave up the premises to the lord of the manor, and the latter then entered and took possession, and afterwards conveyed the premises to the defendants.

The plaintiffs claim to recover possession, on the ground that, the parish having had adverse possession of the premises for more than twenty years at the time of the passing of stat. 3 & 4 *W. 4. c. 27.*, the right of the lord was barred, and an indefeasible freehold interest acquired by the parish, which freehold interest was not afterwards divested by what took place on the admission in 1835, or the surrender to the lord in 1840. The defendants, on the other hand, contend that the possession of the parish, up to the passing of stat. 3 & 4 *W. 4. c. 27.*, was that of tenants at will, and that, consequently, the lord had a period of five years from the passing of the Act, before his right of entry expired; that within such five years a new tenancy at will was created by what took place in 1835, and, consequently a further period of twenty-one years accrued to the lord within which the estate at will might be determined, and that, within such twenty-one years, namely, in 1840, the estate at will was put an end to by the entry and possession of the lord.

If the defendants are right in the position that the parish officers were possessed as tenants at will at the time of the passing of stat. 3 & 4 *W. 4. c. 27.*, the defendants must prevail; as we are clearly of opinion that, if the first tenancy was a tenancy at will, the admission in 1835 operated to create a fresh tenancy of the same kind. If, before the right of entry upon a tenant at will is gone, the tenancy is put an end to, and

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HODGSON express or implied, between the parties, then, according
v. to the decision in *Doe d. Bennett v. Turner* (a) (with which
HOOPER, we concur), a fresh right of entry accrues, and an
additional period of twenty years must run before that
entry would be barred. Whether such a fresh tenancy
was created or not is a question of fact. It is true that
the admission in 1835 took place under an erroneous
belief that the property was copyhold; but this mistake
does not prevent the transaction from operating as what
we find it really was, namely, a determination of the
first tenancy at will, and the creation of a new one;
inasmuch as, the admission being inoperative to convey
a copyhold estate, the possession under it amounted in
point of law to no more than a tenancy at will. The
right of entry of the lord, after this, would not be barred
by efflux of time till 1855. But in 1840, long before it
was barred, the lord of the manor, Mr. *Moore*, actually
entered, and from that time he and those who claim under
him had both possession and title to the premises. This
being so, we are brought back to the question whether
the holding of the plaintiffs, up to stat. 3 & 4 *W.* 4.
c. 27., was as tenants at will, or whether their possession
had been adverse. It was contended, on the part of the
plaintiffs, that the intention of the parties was that a
freehold interest should be created (the grant of the
license being to the licensees and their heirs for ever),
and that the rent was reserved as a quit rent, after the
manner of the rents reserved in ancient times on the
grant of freeholds by lords of manors; and that, although
such a grant would not operate in law as a conveyance

(a) 7 *M. & W.* 226.

of the freehold, yet, the parties having intended to create a freehold estate, possession under the grant would be of a character incompatible with the notion of a freehold title in the grantor, and would therefore be an adverse possession. The proposition of the plaintiffs, that, where there is an intention to convey a freehold estate, and possession is given accordingly, but, owing to some defect in the conveyance in point of law, an estate at will only is created, possession under such circumstances will amount to an adverse possession, if true in point of law (a matter which it is not necessary to determine), must at all events be taken with this qualification, namely, that the intention that the holding should be in the character of a freehold must clearly appear. The incompatibility of the possession with the notion of the freehold remaining in the former owner must be fully established, or the presumption that that which in law is an estate at will was only intended to be such must prevail. But, in our opinion, the plaintiffs fail to establish that there was, in the present case, an intention to create a freehold estate. The so called grant does not purport to convey the fee in the ordinary way. It merely purports to grant a license to inclose the land and to hold it in trust, paying a yearly rent for the same. The argument as to intention, arising from the fact of the grant being made to the grantees and their heirs for ever, is met by the reservation of a yearly rent; more especially as this rent could not be effectually reserved unless the grantor reserved to herself the freehold; and we can see no reason why we should not give effect to this reservation. It seems to us that the terms of the license as strongly manifested that the lady of the manor should for ever have the lordship of

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the land, as that the licensees should hold the land forever. Moreover, the fact of the parish having submitted, in 1835, to the demand of the lord to nominate fresh trustees for admission, at a time when, from the effect of the recent statute, had their possession been adverse, they would have acquired an indefeasible title against the lord, is inconsistent with the notion of their having held as freeholders. On the contrary, such a proceeding is evidence of an acknowledgment that the freehold was in the lord. See *Doe d. Jackson v. Wilkinson (a)*, *Doe d. Thompson v. Clark (b)*. Besides this, the payment of the annual rent, even if it did not turn the holding from a tenancy at will into a tenancy from year to year, (which would exclude all question as to adverse possession), a question which in the view we take of the case it is unnecessary to consider, at all events affords strong evidence that the holding continued permissive; and, as the lords of the manor could, before the statute had run, have turned the licensees out of possession, and probably would have done so, if at any time they had refused to pay the 5*s.* which they had stipulated to pay "for that holding," we cannot but draw the inference that each successive payment of 5*s.* was a fresh acknowledgment that the land was held by the permission of the lord of the manor. It is enough for the decision of this case that we think that, on these facts, the plaintiffs have not established that the holdings which originally had been permissive had, before 1833, become adverse. The onus lies on them to do so, and we do not think they have succeeded. If this be so, the possession was not adverse when stat. 3 & 4 *W.* 4. c. 27. received the

(a) 3 *B. & C.* 413.(b) 8 *B. & C.* 717.

Royal assent. The then lord of the manor had five years more during which his right was preserved ; and he might, at any time before 1838, have entered and resumed possession of the premises.

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We have hitherto spoken only of the part of the premises which was comprised in the license of 1781. Besides this, the parish officers, in 1817, took possession of two roods ten perches of land, parcel of the waste, and inclosed the same, and held possession of it and enjoyed it with the residue. The lord's right of entry to this portion of the land could not, under any view of the case, be barred before 1837 ; and, as this portion of the premises was included in the surrender and readmittance in 1835, before the right of entry was barred, and was also taken possession of in 1840, the defendants are equally entitled to this portion as to the other.

We therefore answer the questions put to us by saying that, in 1840, the churchwardens and overseers of the poor had no greater interest in the premises than that of tenants at will, or, at most, tenants from year to year ; and, secondly, that they were not entitled to the possession of the premises at the time they brought the action.

The result is that there must be judgment for the defendants.

Judgment for the defendants.

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IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

Friday,
June 15th.

MACDONALD *against* LONGBOTTOM.[Reported, 1 *E. & E.* 987.]

Friday,
June 15th.

JOLLY *against* The WIMBLEDON and DORKING
Railway Company.[Reported, in the Queen's Bench and in the Exchequer
Chamber on error from that Court, 1 *B. & S.* 807.]

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

Friday,
June 15th.

GREENOUGH *against* McCLELLAND.[Reported, 2 *E. & E.* 429.]

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

DESLANDES *against* GREGORY.

Friday,
June 15th.

[Reported, 2 *E. & E.* 610.]

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

BETTS *against* MENZIES.

Saturday,
July 7th.

[Reported, 1 *E. & E.* 1020.]

ZWILCHENBART *against* ALEXANDER.

Saturday,
July 7th.

Reported, in the Queen's Bench and in the Exchequer
Chamber on error from that Court, 1 *B. & S.* 234.]

WILEY *against* CRAWFORD.

Saturday,
July 7th.

[Reported, in the Queen's Bench and in the Exchequer
Chamber on error from that Court, 1 *B. & S.* 253.]

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*Saturday,
May 26th.
Saturday,
July 7th.*

LEARY, appellant, *against* LLOYD, respondent.

The sections coming under the head of "Discipline" in The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104., have reference to *British* ships alone.

One of these, sect. 257, renders liable to a penalty "every person who wilfully harbours or secretes any seaman or apprentice who has deserted from his ship."

Held that, in order to convict an offender under this section, it must be shewn that the ship deserted from is a *British* ship: and that, inasmuch as by sect. 19 "every *British* ship must be registered," "and no ship" thereby "required to be registered shall, unless registered, be recognized as a *British* ship," proof that the ship is registered must also be given, either by the production of the original register, or by an examined or certified copy of it, as required by sect. 107.

CASE stated by justices under stat. 20 & 21 Vict. c. 43.

On 25th *January*, 1860, *George Lloyd*, the respondent, who is the police officer employed by *The Newport Dock Company* for the protection of the shipping frequenting the *Newport Docks*, within the borough of *Newport*, in the county of *Monmouth*, and to prevent seamen from deserting their vessels, laid an information, not in writing, before one of the justices for the said borough, against the appellant, *Dennis Leary*, who keeps a sailors' lodging house and beer-house at *Newport*, for having wilfully harboured certain seamen who had deserted their vessel. The information was laid under sect. 257 of The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104.; and a summons was issued and served upon the appellant, who appeared, with his solicitor, at the *Town Hall, Newport*, on *Friday*, 27th *January*, 1860, before two of the justices of the said borough (by whom this case was stated), to answer the charge.

The summons recited that information had been laid "That you, *Dennis Leary*, did on 22nd *January*, 1860, at the borough of *Newport* aforesaid, then and there wilfully harbour *Peter Smith*, *Allen McIntyre*, *Ferdinand Pamin* and *John Brown*, seamen who had deserted

from the *British* ship *Sultana*, knowing or having reason to believe such seamen to have so deserted."

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Evidence of the witnesses in proof of the offence as alleged in the summons was duly taken on behalf of the respondent in the presence of the appellant and his attorney, who cross-examined the witnesses: and, no evidence being called by the appellant in reply, the magistrate deemed the offence proved, and convicted the appellant in the penalty of five pounds, including the costs, in reference to one *Peter Smith*, one of the seamen whom the appellant had harboured in his house. The appellant, being dissatisfied with the determination and conviction of the justices, duly applied in writing to them to state and sign a case for the opinion of the Court of Queen's Bench thereon, which the justices agreed to grant to him, and he (the appellant) having entered into a recognizance to prosecute without delay his appeal, and having otherwise complied with the statute 20 & 21 *Vict. c. 43.*, the said justices stated and signed the case accordingly.

The following evidence was adduced at the hearing in support of the information.

It was proved, by *Samuel Brewster*, that he was the master of the *British* ship, *Sultana*, of *Liverpool*, of 1316 tons burthen, then lying in the *Newport Docks*, within the said borough, where she had arrived a week previously from *Antwerp*; that eleven seamen, who were on the ship's articles of agreement (which were produced) and who had arrived at the port of *Newport* with him in the vessel, had all deserted the said ship; that *Peter Smith*, *Allen McIntyre*, *Ferdinand Pamin* and *John Brown*, named in the summons, were four of the eleven seamen who had so deserted; that the men signed the

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articles at *Antwerp*, to come to the port of *Newport* and from thence to proceed to a port in the *United States* and back to a port of discharge in the *United Kingdom*; that the men, having only just commenced their voyage, and having no right to leave the ship, deserted either on the night of the 21st or 23rd *January*, 1860, and took away all their clothes and effects with them. The official log book of the ship was not produced, but it was proved that the aforesaid *Peter Smith*, *Allen McIntyre*, *Ferdinand Pamin* and *John Brown* had severally been duly convicted, on 25th *January*, 1860, at *Newport*, by two of the justices for the said borough, of having deserted from the said vessel, *The Sultana*; and had been, each of them, sentenced to three weeks' hard labour for that offence.

The appellant's attorney here objected that there was no evidence before the magistrates that *The Sultana* was a *British* ship. That the evidence of the master that she was such, and the production of the articles of agreement signed by the deserting seamen, which were in the form required by The Merchant Shipping Act, 1854, was insufficient proof of the ship being a *British* vessel, in the absence of the certificate of registry, which he contended ought to be produced. He further contended that, in the absence of the official log book, no legal evidence was before the justices in proof of the men named in the summons being deserters.

The justices were satisfied with the evidence before them that the ship was a *British* ship, and that the seamen named on the summons had deserted from the said vessel. Sect. 244 of The Merchant Shipping Act, 1854, was referred to in reply to the appellant's attorney's objection.

Michael Miles proved that he was the watchman employed on board *The Sultana* to watch the ship and see nothing went out of her; that he was going on board the ship at twenty minutes to six o'clock on *Sunday* night, *January* 22nd; that *The Sultana* was lying second ship off the dock wall, a *Bremen* ship being moored next to her; that he then and there saw *Leary*, the appellant, standing on the dock wall, and saw a bag of clothes thrown down on the wall, and one of *Leary's* men take away the bag. *Miles*, concluding that seamen were deserting, seized the bag of clothes, and took it from the man who was carrying it away, when another man (a sailor) ran up and said, "This is my bag," and pulled it away from the watchman. *Leary* stood by and said to the witness, "*Mike*, go on board your ship." *Miles* replied, "No, *Leary*; you are carrying on a pretty game here to-night, and I will report you for it." To this accusation *Leary* made no reply. The watchman then proceeded on board his ship, *The Sultana*, and in order to reach her he had to pass over the *Bremen* ship, lying next the quay wall. On the deck of the *Bremen* ship he saw beds and other seamen's effects wrapped up, and some seamen standing by. He called the mate of the *Bremen* ship, and asked him if the beds &c. belonged to the vessel; and the mate replied, in the hearing of *Leary*, who was then standing under the *Bremen* ship's bows, that they belonged to *The Sultana*.

It was then proved by *George Lloyd*, the respondent, that, in consequence of the information he had received from Captain *Brewster* and the watchman *Miles*, he went, with other police officers, to the house of the appellant, on 23rd *January*, and in his house they found

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four of the eleven men who had deserted, namely, *Peter Smith, McIntyre, Pamin* and *Brown*, named in the summons. They were in the tap room openly; a fifth man, on seeing the officers, ran away. The seamen were taken to the police station, and on the following day were duly convicted before two justices and were severally committed to prison, for deserting their said ship *Sultana*. It was proved that *Leary* was present or in his house at the time the deserters were so taken out of it; but *George Bath*, one of the police officers who went with the respondent to apprehend the said seamen, proved that he saw *Leary* in the street, in the evening of the day on which the said four seamen were taken into custody, and told him (*Leary*) that four sailors had been apprehended in his house for deserting from *The Sultana*. *Leary* replied, "Is that all?" The witness, *Bath*, said "Yes." *Leary* said, "There are some more there; I don't want them; they came to me. The captain can have them if he likes. They shall pay me for their board before they get their clothes."

The appellant's attorney having contended that there was no evidence to shew that the bag of clothes thrown from, or the effects found upon, the *Bremen* ship, were part of the effects of the deserting seamen from *The Sultana*, and that the appellant did not know the men were deserters, the justices, looking at all the circumstances proved in evidence, deemed the offence proved in reference to *Peter Smith*, and convicted the appellant in the penalty of 5*l*, including costs, for wilfully harbouring him, knowing or having reason to believe he had deserted his ship.

The question for the decision of the Court was, whether the conviction was right or wrong.

No counsel appeared in support of the conviction.

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Dowdennell, for the appellant. The justices were wrong in convicting the appellant, in the absence of legal proof that *The Sultana* was a registered British ship. The conviction was under sect. 257 of The Merchant Shipping Act, 1854, which renders liable to a penalty "every person who wilfully harbours or secretes any seaman or apprentice who has deserted from his ship," "knowing or having reason to believe such seaman or apprentice to have so done." Now, inasmuch as this section occurs in Part III. of the Act, by "ship" must be meant a "sea-going" ship "registered in the *United Kingdom*"; sect. 109 declaring that the whole of the Third Part of the Act shall apply to all such ships. And by sect. 19, "Every *British* ship must be registered in manner" thereafter "mentioned"; "and no ship" thereby "required to be registered shall, unless registered, be recognized as a *British* ship." In order, therefore, to bring the appellant within the operation of sect. 257, it was imperative upon the respondent to prove to the justices that *The Sultana* was a registered *British* ship. The only evidence adduced for that purpose was the statement of the captain; whereas, by sect. 107, the Act requires the register to be proved, "either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the registrar or other person having the charge of the original." At common law, no doubt, the ownership of a ship might be sufficiently proved by parol evidence of the possession of the owners as owners, without the aid of any documentary proof or title deeds.

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on the subject; *Robertson v. French* (a); and, in *Sutton v. Buck* (b), possession of a ship under a transfer, void for non-compliance with the then register Acts, was held a sufficient title in trover against a stranger for parts of the ship, being wrecked. But the provisions of The Merchant Shipping Act, 1854, render it imperative to prove the registry and the *British* character of a ship in the manner thereby required. Again, in the absence of the official log book, there was no sufficient evidence before the justices that the seamen were deserters. Sect. 244 requires entries of the commission of offences by seamen to be made in that book and signed by the master and also by the mate or one of the crew, and enacts that "in any subsequent legal proceeding" such "entries" "shall, if practicable, be produced or proved, and in default of such production or proof the Court hearing the case may, at its discretion, refuse to receive evidence of the offence." [*Blackburn J.* Under that section the justices had a discretion to receive other evidence, if they thought fit.] Then, lastly, there was no evidence to shew that the appellant knew or had reason to believe that *Smith* was a deserter. [*Wightman J.* Surely there was some evidence of that.]

COCKBURN C. J. Upon the first point, the Court will take time to consider; but we all think that there is nothing in the others.

Cur. adu. vult.

BLACKBURN J. now delivered the judgment of the Court (c). This was an appeal against a conviction on

(a) 4 *East*, 130, 136, 137.

(b) 2 *Taunt.* 302.

(c) *Cockburn C. J., Wightman and Crompton J.*s.

an information under the 257th section of The Merchant Shipping Act, 1854, for harbouring a deserter from the *British* ship *Sultana*. On the hearing, before the magistrates, no certificate of the registry of the ship having been produced, an objection was taken that there was no proof that the ship in question, which was alleged to be a *British* ship, had been registered pursuant to the requirements of the Act in question, and that the information, therefore, could not be sustained. The magistrates having overruled this objection, the same point was taken before us upon the hearing of the appeal; and we are of opinion that the objection is well founded and must prevail. After a careful consideration of the Act, we are of opinion that the sections coming under the head of "Discipline," of which the section in question is one, have reference to *British* ships alone. But, by the 19th section, no ship, required to be registered, shall, unless registered, be recognised as a *British* ship. It follows that in a proceeding in which it becomes necessary to shew that a ship is a *British* ship, proof of the ship having been registered becomes essential, to invest the ship with the character of a *British* ship. Such proof was, in the present case, wanting; and its absence ought, in our opinion, to have prevented a conviction from taking place. We therefore hold that the conviction was wrong and must be reversed.

Conviction reversed.

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LEARY
V.
LLOYD.

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Wednesday,
January 18th.
Sole day,
July 7th.

The QUEEN, on the prosecution of the Churchwardens and Overseers of the Poor of St. MARY, CARDIFF, respondents, *against* The Company of Proprietors of the GLAMORGANSHIRE CANAL NAVIGATION, appellants.

The Act incorporating appellants, a canal Company, provided that the Company should "from time to time be rated to all parliamentary and parochial rates and assessments

UPON an appeal to the *Glamorganshire* Quarter Sessions against a rate for the relief of the poor, duly made by the respondents on 19th *December*, 1857, and to which the appellants were assessed, the Sessions confirmed the rate, subject to the opinion of this Court on the following case.

The appellants are, and at the time of making the rate

for and in respect of the lands and grounds to be purchased or taken by the "Company" "in pursuance of" the "Act, in the same proportion as other lands lying near the same are or shall be rated, and as the same lands and grounds so to be purchased or taken would be rateable in case the same were the property of individuals in their natural capacity."

In pursuance of the Act, the Company purchased lands and made the canal. At that time the lands adjoining those so purchased were let for use as mere land; but they afterwards greatly increased in value, and at the time that the rate now appealed against was made, were extensively built over, and worth, if let for the purpose of being built on, 6d. per annum the square yard. The average rateable value, at the time of making the rate, of the nearest land to the canal which was then still used as mere land, was about 3d. per acre per annum. Upon other land adjoining the canal, wharfs, yards and buildings had before then been erected, the average rateable value of which was then 5d. the square yard.

On a case stated for the opinion of this Court by Sessions, on an appeal by the Company against a poor-rate made by respondents, for a parish in which part of the canal was situate, to which appellants were assessed in the same proportion as the lands lying near the canal were rated, as occupied at the time the rate was made: Held, that appellants were not rateable in proportion only to the rateable value of the whole of the lands adjoining the canal, considered as mere land, but that the true principle of their rateability was that the adjoining land covered with buildings should be brought into hotchpot with the adjoining lands of other descriptions, and that appellants should be rated for the land occupied by the canal according to the aggregate value, at the time of making the rate, of the whole land brought into hotchpot, that value being the rent which a tenant from year to year would give for the whole, in estimating which, regard was to be had to that proportion of the rent paid by the tenant of any building standing on the land which he might be supposed to pay in respect of its site as enhanced in value, by and the uncovered land by being built upon.

Hereinafter mentioned were, the owners and occupiers of the *Glamorganshire Canal*. Part of that canal, running nearly north and south, is situate in the parish of *St. Mary, Cardiff*. By a rate or assessment for the relief of the poor of the said parish, duly made on 19th *December*, 1857, and which rate was duly allowed and published, the appellants were rated as the occupiers of that part of the canal lying within the said parish, and the other lands, tenements and premises, occupied by them within the same. *The Company of Proprietors of the Glamorganshire Canal Navigation* were incorporated under an Act of Parliament passed in the year 1790, 30 G. 3. c. lxxxii. (a), entitled "An Act for making and maintaining a navigable canal from *Merthyr Tydvile*, to and through a place called *The Bank*, near the town of *Cardiff*, in the county of *Glamorgan*." The said Act, after a preamble reciting that the making and maintaining the proposed canal would open communications with several extensive ironworks and collieries, and be of public utility, incorporated the Company by and under the name of "*The Company of Proprietors of the Glamorganshire Canal Navigation*," and authorized and empowered the said Company to make and maintain the said canal, and to purchase and take lands for the use of the undertaking, and to take certain rates and tolls from persons using the said canal. By sect. 67 of the above Act it was enacted, "That the said Company of proprietors shall from time to time be rated to all parliamentary and parochial rates and assessments for and in respect of the lands and grounds to be purchased or taken by the said Company of proprietors in pursuance

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of this Act, in the same proportion as other lands and grounds lying near the same are or shall be rated, and as the same lands and grounds so to be purchased or taken would be rateable in case the same were the property of individuals in their natural capacity." The above is the only section of the Act which has reference to the subject of rating the Company's property. This section was afterwards incorporated in another Act, 36 G. 3. c. lxix. (a). By virtue of these two Acts, the Company purchased and took certain lands, and made the canal and the works connected therewith, part of which said lands and premises lies within the said parish of *St. Mary, Cardiff*, and is the property rated as above. Before and at the time of the formation of the said canal and the works connected therewith, the lands purchased and taken by the Company in the said parish for the purposes of the said canal and works, and the lands adjacent and lying on each side thereof, were of very much less value than they are at present. The whole of the land taken was at that time let at the usual rent given for land in the neighbourhood of towns; but now, owing to the rapid increase of the population and the consequent need of further house accommodation in *Cardiff*, the adjoining land has been extensively built over, and is the site of several streets and squares. Such land is now worth, when let for the purpose of being built on, 6*d.* per annum the square yard. The average rateable value of the land lying nearest to the canal and towing path, on the eastern side thereof, which is used as mere land, is about 3*l.* an acre per annum. On the western side of

(a) Local and personal public. "To amend" stat. 30 G. 3. c. lxxxii., "and for extending the said canal to a place called *The Lower Layer*, below the said town."

the canal the lands and premises taken and occupied by the Company under the said Acts, are abutted upon by wharfs and yards in the occupation of iron masters and other private individuals, used for the purposes of trade and commerce. These wharfs and yards, with the buildings belonging thereto, are actually rated as wharfs and yards, at various sums which, together, give an average of about 5*d*. the square yard of the land occupied thereby. Beyond the said wharfs and yards on the western side, immediately adjoining them, and within a short distance of the Company's canal and the premises connected therewith, is a quantity of land, separated from the canal only by the wharfs, and which is used as mere land; the rateable value whereof, and of the other land in the immediate vicinity, was taken, for the purposes of the said appeal, at an average of 3*l*. an acre per annum. Until the rate, the subject of appeal, was made, the Company had been rated by the said parish in respect of the said land under the canal and towing path, at the sum of 120*l*. per annum only, in respect of the lands and premises mentioned; and that sum was admitted, for the purposes of the said appeal, to be the full rateable value of the lands and premises taken and occupied by the Company under the said Acts, situate within the said parish, supposing the same to be assessed and rated at the average annual rateable value of the land, used as mere land, lying nearest thereto. By the present rate the appellants are rated for the bed of the canal and the towing paths in the same proportion as the lands and grounds lying near thereto are rated in the same assessment, and in the same proportion in which they would be rated in case they were the property of individuals in their natural capacity.

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At the Quarter Sessions the appellants confined their objections to the principles so adopted by the respondents and involved in the said assessment. They contended that, by the principle of rating so adopted by the parish, they were assessed at too high an amount in respect of the lands occupied by the bed of the canal and the towing paths, and also in respect of the lands and premises abutted upon by the wharfs and yards. They contended that, under the provisions of the 67th section of the Act, they were only liable to be assessed, in respect of their lands and premises, at the rateable value of land adjoining thereto, if the same had remained mere land, and at the time of the rate was used only for purposes consistent with its retaining that character. The Court of Quarter Sessions found, for the purposes of this case, that the lands and grounds occupied by the appellants were not overrated, if the correct principle was to rate their lands and grounds in the same proportion as the lands and grounds lying near were rated, as occupied at the time of making the said rate, and as if the lands and grounds were the property of individuals. But that the appellants were overrated, if their lands and grounds should have been assessed as the lands and grounds lying near thereto would have been, if they had continued to be used as mere land.

The question for the opinion of the Court was, whether the principle of assessment adopted by the respondents is based upon the correct construction of the provisions of the Act regulating the rating of the Company's lands; and whether the said provisions, and the facts and circumstances disclosed in the case, warranted the order of the Court of Quarter Sessions. If the Court should be of that opinion, then the order of

the Court of Quarter Sessions was to stand, and the rate to remain for the full sum at which the canal and premises had been assessed by the respondents. If the Court should be of the contrary opinion, then the rate was to be amended by reducing it to the amount of the former assessment.

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Field and Bowen, for the respondents. The question turns upon the proper construction of sect. 67 of the Act incorporating the appellants, 30 G. 3. c. lxxxii. By that section the appellants, as proprietors of the *Glamorganshire Canal*, are to be rated from time to time, amongst others, to parochial rates and assessments, in respect of the lands and grounds to be purchased or taken by them for the purposes of the Act, "in the same proportion as other lands and grounds lying near the same are and shall be rated, and as the same lands and grounds so to be purchased or taken would be rateable in case the same were the property of individuals in their natural capacity." The question is, whether the parish officers, in assessing to the poor-rate the lands purchased or taken by the Company, the appellants, are to adopt, as the basis of assessment, the rateable value of the adjacent lands and grounds, considered as mere land, as it stood at the time of the passing of the Company's Act; or whether they are to estimate the assessment according to the present rateable value of those lands, as actually used and occupied at the time of making the rate. The latter is the correct principle. At the time that the Company's Act was passed, an impression existed that the receipt of mere tolls made the recipient rateable to poor-rate, although he occupied no real visible property in the rating parish, connected with the tolls.

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Rex v. Nicholson (a) put an end to that impression; and since that decision the Courts leant to such a construction of Acts of Parliament, making lands used for the purpose of obtaining tolls rateable, as excluded the tolls from being taken into consideration as an element in the rateable value of the lands. Thus, in *Rex v. The Regent's Canal Company* (b), it was held that land of a canal Company, used by them for the purpose of the canal, was rateable to poor-rate, quæ land, not in respect of its improved value, but in respect of that which would have been its value if it had not been used for the purposes of the canal: the Company's Act providing that lands, whether covered with water or not, and also all dwelling-houses, wharfs, &c., belonging to the Company, should be rateable, the lands according to their quantity and quality, and the dwelling-houses, wharfs, &c., according to the nature and respective uses thereof; and should be assessed in like manner as lands of a like quality, and dwelling-houses, wharfs, &c., of a like and similar size or nature in the respective parishes where the same should be situate, should be assessed. *Bayley J.*, in giving judgment said (c), "I think that that land" (land, part of which was covered with water) "is to be rated in the same manner as land of the same quality would have been if it had not been converted into a basin, or applied to the other purposes of the canal. If it had been intended that it should be rated according to its improved value, the Legislature would have said so. Indeed, if that be the effect of the clause, it is wholly useless, as far as the land is concerned, for that would be rateable for its improved value if the Act had not

(a) 12 *East*, 330.

(b) 6 *B. & C.* 720.

(c) At p. 730.

contained a provision on the subject." In *Rex v. The Leeds and Liverpool Canal Company* (a) it had already been held that, when an Act directs that canal tolls shall be exempt from any taxes, rates, &c., other than such as the land which should be used for the purpose of the navigation would have been subject to if the Act had not been made; that goes to exempt the tolls, quæ tolls, altogether from being rated in respect of the line of canal so exempted, leaving the land rateable as before. These decisions establish that the rateable value of land used for a canal is to be determined, under Acts of Parliament like that before the Court, not by its improved value arising from such use, but by that which would have been its value had it remained in use as land. They do not, however, lay down that this hypothetical value is to be arrived at by reference to the time at which the canal was formed, and not to that at which the particular rate is made. But any doubt upon that point is cleared up by *Rex v. The Monmouthshire Canal Company* (b). The Company's Act, in that case, provided that the Company should, from time to time, be rated in respect of the lands and grounds to be taken, and the buildings to be erected by them, in the same proportion as, and not at any higher value or improved rent than, other lands, grounds and buildings adjacent were or should, for the time being, be rated, and as the lands, grounds and buildings, to be taken and erected by them, would have been rateable, in case they had continued in their former state, and not been used for the purposes of the undertaking. The adjacent lands and buildings having improved in value,

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(a) 5 East, 325.

(b) 3 A. & E. 619.

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from the time of the commencement of the undertaking, partly in consequence of the undertaking having been carried into effect, partly from independent causes, this Court held that the land and buildings used for the canal were to be rated at the value which the adjacent lands, &c., bore at the time of the rate; and not at the value which these latter bore at the commencement of the undertaking, nor at that which they would have borne at the time of the rate if the undertaking had not been carried into effect. And the Court came to this conclusion, although, during the forty years which had elapsed from the passing of the Act to the time of the question being raised, the rate had always been made according to the original value of the lands adjacent. The principle of that decision is directly in favour of the contention of the respondents in the present case; although the language of the Act, there, was rather larger than that of the present appellants' Act, inasmuch as it expressly referred to the value at which the adjacent lands, &c., were or should, for the time being, be rated. The present Act does not specify "the time being," but it refers to the proportion at which adjacent lands, &c., "are or shall be rated." In all cases of this description the object of the Legislature is to leave the land taken by the Company to be rated from time to time just as it would have been if the Company had not taken it; giving, as the test of its rateable value from time to time, that of the lands adjacent. [*Cockburn* C. J. If so, might not a difficulty arise, if there was a difference in the value of the lands adjacent on the opposite sides of the canal?] In such a case the Sessions would strike an average. The appellants' Act makes their lands and grounds rateable in the same

proportion as other lands and grounds "lying near the same." Those lands, &c., can be ascertained with as much certainty as though they had been scheduled to the Act. What constitutes "lying near" is a question of fact for the Sessions; and they have found as a fact that the lands and grounds occupied by the appellants are not overrated, if the correct principle is to rate them in the same proportion as the lands and grounds lying near were rated, as occupied at the time of making the rate, and as if the lands and grounds were the property of individuals. The appellants will rely upon *Regina v. The Grand Junction Canal Company (a)*. The Company, in that case, were, under their Acts of Parliament, to be rated in respect of their lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses and other buildings to be erected by them, in the proportion that other lands, grounds and buildings lying near the same were or should be rated, and as the same lands, grounds and buildings would be rateable in case the same were the property of individuals in their natural capacity. When the canal was made, the land taken for and that adjoining the canal alike consisted of agricultural and garden land; but of late years the land adjoining had become applicable for building purposes, and large portions of it had been let for such purposes on leases for ninety-nine years, at ground rents greatly exceeding the rents at which the lands could be let for agricultural and garden purposes; and buildings had been erected on such lands, in pursuance of the covenants contained in the leases. The increased rentals could not have been obtained,

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(a) 7 *Weekly R.* 597.

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unless the lands had been let for long terms, and on building leases containing the usual covenants. Upon these facts the question arose, upon what principle the sum at which the canal was rateable ought to be estimated. The Court consisted only of Lord *Campbell* C. J. and *Erle* J., and the following brief judgments were delivered. Lord *Campbell* C. J. said, "We are" "clearly of opinion that this canal and towing paths cannot be rated at the value of land let on building leases. That land must be rated on the principle of what a tenant from year to year would give for it, and under those circumstances he would not build upon the land." And *Erle* J., "It is often the case that land near to a house is the subject of a covenant not to be built on, and this land occupied by the canal and towing paths is in a similar position. The Company ought to be rated according to the value of land near the canal in its natural state; viz., at the value a tenant from year to year would give for it, and not on its building value." The marginal note represents the Court to have held "that the Company were to be rated for their lands at the same value as other adjacent lands used for agricultural or garden purposes." That, however, is an incorrect statement of the decision, which merely was, as the marginal note proceeds to say, that the Company were "not" to be rated "at the value of adjacent lands let, or capable of being let, on building leases." It is not now contended, for the respondents, that either the applicability to building purposes of the land adjoining the appellants' property, or the rent which a lessee of it for a long term of years, for such purposes, would give, is to be taken into account. The respondents admit that the true criterion is the rent which a

tenant from year to year would give for the lands. [Wightman J. Suppose that the whole of the lands were covered with buildings which produced a great increase of rental. Might the parish take the increase into account?] Yes; so far as the value of the land was enhanced to a tenant from year to year, by being built upon. [Cockburn C. J. If your contention is right, the Company are exposed to great hardship, being rateable on the improved value of the land adjoining the canal, but without the power of increasing the value of their own land.] The hardship, if any, results from the bargain made by the Company with the parish; which is embodied in and must be collected from the Act of Parliament. Moreover, the land taken by the Company is taken out of the hands of the parish.

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Bovill, H. Giffard and G. B. Hughes, for the appellants. The rate is excessive. Even assuming that the appellants are rateable, under the 67th section of their Act, in the same proportion as the lands and grounds lying near the canal were rated at the time of making the rate, so much of the adjacent lands and grounds as were at that time covered with wharfs and buildings are not "lands" within the meaning of the Act, which must refer to lands used merely as such. If the Court adopt the opposite construction of the enactment, the clause, which was intended to protect the canal Company from an excessive impost, will, as has been pointed out by *Cockburn C. J.*, become the means of inflicting upon them an increased burthen. The first lands, left in their natural state, which are reached, after leaving the canal, are the lands the rateable value of which is to be considered for the purpose of rating the canal. [*Cock-*

1860. *burn* C. J. In course of time the whole of the lands adjacent to the canal will probably be covered with buildings.] If so, the first uncovered land, beyond the buildings, would then become the "lands" "lying near" the canal, within the meaning of the Act. [*Cockburn* C. J. That would strain the language of the Legislature very much.] *Regina v. The Grand Junction Canal Company* (a) is strongly in point to shew that, even if the rateable value of the land immediately adjoining the canal is to be taken as the criterion of the rateability of the canal, that rateable value is the rent which a tenant from year to year would give for such land in its natural state; not that which a lessee of it for building purposes would give. That case was decided on the authority of *Rex v. The Grand Junction Canal Company* (b), in which Lord *Ellenborough* C. J., in giving judgment, said, "The" "Act directs that the Company shall be rated for and in respect of their lands in the same proportion as other lands near the same, and as the same would be rateable in case they were the property of individuals in their natural capacity, by which I understand that they are to be rated as other lands would be supposing them not to be applied to the purposes of the canal, but to have remained in the hands of individual farmers for the ordinary purposes of agriculture, and not possessing any artificial value." And *Abbott* J. thus explained the reason for the legislative protection of the canal Company. "This was a scheme which might be wholly unproductive. We have all seen, in passing through the country, many instances in which similar undertakings have failed, either from want of water or from

(a) 7 *Weekly R.* 597.(b) 1 *B. & Ald.* 280. 293. 295.

a change in the circumstances of the country through which the proposed line of canal was to have passed, and the Legislature, therefore, might not think it improper to insert a clause in a canal Act, the effect of which would be, that if the canal were not perfected, still the parishes should not be deprived of the benefit of the land which before that time paid rates to the poor, and that if the canal were perfected, then the Company should be rated for it as land, at the rate at which the land was estimated before, when it was only subject to tillage." Moreover, The Parochial Assessment Act, 6 & 7 W. 4. c. 96. s. 1., requires poor rates to be made upon an estimate of the net annual value of the several hereditaments rated thereto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of certain deductions. Now, a tenant from year to year would not take land for building purposes, but only for use as land.

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Cur. adv. vult.

COCKBURN C. J. now delivered the judgment of the Court.

In this case the question turns upon the effect of a clause in a canal Act, whereby the proprietors are protected against being rated in respect of the increased value of the land occupied by the canal, by reason of its being so occupied, by a provision that the Company shall be rated "in the same proportion as other lands and grounds lying near the same are or shall be rated." A state of things has arisen which evidently is very different from that contemplated by the Legislature at the time the Act passed. The object of the enactment was to give immunity to the canal Company against being

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rated in respect of the increased value of the land, resulting from its occupation as a canal, as distinguished from its previous value, as used for agricultural purposes. But, in the new state of things which has arisen, the adjoining land, instead of being of inferior, has, by its being used as wharfs and its application to building purposes, become of greater value than the soil occupied by the canal. A provision which was intended for the benefit of the canal Company has thus become the means of casting an additional burden upon them, and entails on them a considerable hardship. Nevertheless, we are of opinion that full effect must be given to the enactment. Its language being clear and precise, it is not competent to us to modify its provisions, in order to meet a state of things which, if it could have been contemplated by the Legislature at the time of passing the Act, would probably have been provided against. Relief in such a case can only be sought at the hands of the Legislature, whose province we should be usurping if we were to put a construction on the Act different from what its terms warrant, in order to meet the equity of the case. We have no hesitation, therefore, in rejecting the proposed construction, that we are to consider, not what is the rateable value of the land immediately adjoining the canal, but that of the nearest agricultural land, no matter how far removed, in order to give effect to what the Legislature had in view in passing this clause. The enactment is clear and unambiguous, that the lands occupied by the Company shall be rated in the same proportion as the adjoining lands. The Court cannot construe the enactment differently because the relative value of the land occupied by the canal and of the adjoining land have become changed. But a new

difficulty presents itself, from the circumstance that the adjoining lands are no longer rateable simply as land. They have become in many instances covered with buildings of a valuable description, and the value of the land becomes, as it were, merged in that of the buildings by which it is covered. It is possible, however, to ascertain the value of the land as applicable and subservient to building purposes, as distinguished from the joint value of land and buildings; but here a new difficulty presents itself. By The Parochial Assessment Act, property is to be rated according to the rent which a tenant from year to year might be expected to give for it. Now a tenant from year to year would not give for the land in question a rent equivalent to its value for building purposes; it is only in the hands of a lessee with a long term that the land would have this larger value. For this reason this Court, then consisting of my Lord *Campbell* and *Erle J.*, in the case of *Regina v. The Grand Junction Canal Company (a)*, held, on a provision similar to the present, that land occupied by a canal Company was not liable to be rated otherwise than as agricultural land, notwithstanding that the adjoining land was occupied as land covered with buildings. We cannot, upon consideration, bring ourselves to acquiesce in the propriety of that decision. It appears to us that, in applying The Parochial Assessment Act to such a case as the present, the criterion is not what a tenant from year to year would give for the land to be rated, that is, the land occupied by the canal Company, but what such a tenant would give for the adjoining land, according to the rating of which the land in question is, by the provision of the enactment which we are called upon to construe, to be rated. Now

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the adjoining land, being built upon, is worth so much to a tenant from year to year, as land built upon. In the yearly rent paid for a building, a certain proportion of the rent must be taken as paid in respect of the land occupied by the building. That proportion, larger, no doubt, than the value of the land if not applied to building purposes, is capable of being ascertained. It is, in our opinion, the rateable value of the adjoining land, and should be taken to be the proportion in which the lands and grounds lying near the canal in question are rated, within the 67th section of this Act of Parliament; and, consequently, as the proportion in which the land occupied by the canal is to be rated. To rate the latter according to what a tenant from year would give for it, independently of what such a tenant would give for the adjoining land, is, as it seems to us, to rate it independently of the rating of the adjoining land; in other words, to give no effect to the provision of the section according to which the rating is to be made. We hold, on these grounds, that the position taken by the argument of the appellants, that the whole of the land in question ought to be rated as mere land, is not tenable, as relates to the adjoining land when built upon or made into wharfs. But as, where the adjoining land has not been applied to such purposes, it must be treated as land under The Parochial Assessment Act, and cannot therefore be rated as land applicable to building purposes, at all events beyond what a tenant from year to year would give for it for such a purpose, it appears to us that the true principle on which the rate should be made is, that the land covered with buildings, valued as we have already pointed out, should be brought into hotchpot with the land of the other

description, in each particular parish ; and that the land occupied by the canal should be rated according to the aggregate value of the whole. This can, of course, be at best but a rough estimate ; but it appears to us to be the only means of giving effect to the provisions of the various Acts of Parliament. The rate must therefore be amended accordingly.

Rate to be amended.

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BLECH *against* BALLERAS and Others.

Friday,
June 22nd.
Saturday,
July 7th.

DECLARATION. That, before and at the time of the making the agreement hereinafter mentioned,

Plaintiff,
having char-
tered a
steamer,
agreed with

defendants to take out some engines in her to *Barcelona*, it being known to both parties that the engines could not be shipped unless some alterations were made in her hatchways. The agreement contained the following conditions. First: that plaintiff should by the steamer on her berth at *Liverpool* for *Barcelona*. Secondly: that she should not be required to lie on her berth longer than ten days. Thirdly: that she should make the voyage from there to *Barcelona* for the lump sum of 650*l.*, plaintiff to pay all charges. Fourthly: that defendants should load in the steamer two engines and tenders complete, for 240*l.*, freight to be paid at *Liverpool* on delivery of bills of lading, without any deduction for interest or insurance. Fifthly: that such of the above goods as weighed above 20 cwt. should be put in the steamer, stowed, taken out and landed at shipper's risk and expense. Sixthly: that the said goods should be taken out of the steamer as soon as the captain was ready to deliver them, in five days, *Sunday* excepted; and 20*l.* sterling demurrage to be paid by the shipper or receiver of the said goods, for every day that she was detained over and above five days. Seventhly: that the steamer should be entered in the joint names of plaintiff and defendants, so that the latter might assist to get cargo. Eighthly: that any surplus of freight above 650*l.* should be divided between plaintiff and defendants, and also any loss which might result. Ninthly: that the said steamer should guarantee to carry 480 tons dead weight, besides 40 tons of coal in the bunkers. Tenthly: that the bills of lading for the whole cargo of the said steamer should be signed at the office of plaintiff. Eleventhly: that the steamer should be consigned at *Barcelona* to the friends of defendants, paying 2*l.* commission on the above freight.

The steamer was put on her berth at *Liverpool*, and, by consent of her owner, the beams in her hatchways were removed, for the stowage of the engines, at the joint expense of plaintiff and defendants. The engines, which exceeded 20 cwt. in weight, were then brought alongside; and it was found, before ten days had expired, that they would not go down the hatchways, notwithstanding the removal of the beams. The consent of the shipowner to the further widening of the hatchways was thereupon obtained on condition that the ship should, before sailing, be made right, to the satisfaction of *Lloyd's* surveyor. In

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consequence of the necessary delay for widening the hatchways and making the ship thus right, she lay on her berth thirteen days beyond the stipulated ten.

Plaintiff

having brought this action, on the second clause of the agreement, for demurrage in respect of the detention by defendants of the ship on her berth beyond ten days: Held, that defendants were liable on that clause, it being collateral to and independent of any partnership in the freight; assuming that the agreement constituted a partnership to some extent between the parties in that respect.

The Judge directed the jury that, by

reason of the 5th clause of the agreement, defendants were liable for any detention of the ship necessary to effect such alterations in her as would enable the engines to be put on board by defendants. Held a right direction.

plaintiff was lawfully possessed of a certain screw steam-vessel called *The William France*, and thereupon afterwards defendants agreed with plaintiff as follows. First: that plaintiff should lay the steamer *William France* on the berth in *Liverpool* for *Barcelona*, on her arrival at *Liverpool* from *London*, having discharged her cargo. Secondly: that the said steamer should not be required to lie on her berth longer than ten days. Thirdly: that the said steamer should make the voyage from *Liverpool* to *Barcelona* for the lump sum of 650*l.*, plaintiff to pay all charges. Fourthly: that defendants should load in the said steamer two engines and tenders complete for 240*l.*, freight to be paid at *Liverpool* on delivery of bills of lading, without any deduction for interest or insurance. Fifthly: that such of the above goods as should weigh above 20 cwt. should be put in the said steamer, stowed, taken out and landed at the shipper's risk and expense. Sixthly: that the said goods should be taken out of the said steamer, as soon as the captain should be ready to deliver them, in five days, *Sunday* excepted, and 20*l.* sterling demurrage should be paid by the shippers or receivers of the above named goods, for every day she should be detained over and above five days. Seventhly: that the said steamer should be entered out in the joint names of plaintiff and defendants, so that the latter might assist in getting cargo. Eighthly: that any surplus of freight above 650*l.* should be divided between defendants and plaintiff, and also any loss which might result. Ninthly: that the said

steamer should guarantee to carry 480 tons dead weight, besides 40 tons of coals in the bunkers. Tenthly: that the bills of lading for the whole cargo of the said steamer should be signed at the office of plaintiff. Eleventhly: that the said steamer should be consigned at *Barcelona* to the friends of defendants, paying 2½ per cent. commission on the above freight. Averment: that plaintiff did accordingly lay the said steamer on the berth in *Liverpool*, according to the terms of the said agreement. Breach: that although, before suit, all conditions precedent had been performed and fulfilled, and everything had happened and been done, and all times had elapsed, necessary to entitle plaintiff to a performance of the said agreement by defendants, and to maintain his action for the breach thereof thereafter mentioned, Yet defendants did not perform the said agreement on their part, and did require the said steamer to lie on her berth longer than ten days; and accordingly the said steamer was detained by defendants in and about the loading the said engines and tenders on board the said steamer at her berth, and the said steamer did, on that account, lie on her berth for a longer space than ten days, to wit, for the space of twenty-three days; and by reason of the premises plaintiff had been put to and incurred divers great costs and expenses, &c.

The declaration also contained counts for money payable by defendants to plaintiff for the demurrage of a ship of plaintiff kept on demurrage by defendants, and for money found to be due from defendants to plaintiff on an account stated between them.

Pleas. 1. To first count. That plaintiff was not possessed of the said vessel, and that defendants did not

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agree as alleged. 2. To same. That plaintiff did not lay the said steamer on the berth in *Liverpool* for *Barcelona*, according to the terms of the said agreement, as alleged. 3. To same. That defendants did not require the said steamer to lie on her berth longer than ten days, and that the said steamer was not detained by defendants in or about the loading the said engines and tenders on board the said steamer, at her berth; and that the said steamer did not, on that account, lie on her berth for a longer space than ten days. 4. To same. That, after the making of the said agreement, and before the committing of any breach thereof by defendants, and before this suit, plaintiff exonerated and discharged defendants from further performance of the said agreement. 5. To same. That plaintiff and defendants agreed together to become partners in a speculation of sending the said steamer to *Barcelona*, and the said agreement was the agreement by which they agreed upon the terms of the said partnership; and defendants say that the requiring the said steamer to lie on her berth longer than ten days, and the detaining of her in and about the loading of the said engines and tenders were done, not by defendants alone, but by defendants and plaintiff jointly. 6. To same. That plaintiff and defendants agreed together to become partners in a speculation of sending the said steamer to *Barcelona*, and that the agreement in the first count mentioned was the agreement by which they agreed upon the terms of the said partnership; and defendants say that the agreement on the part of defendants, that the said steamer should not be required to lie on her berth longer than ten days, and that defendants should load in the said steamer two engines and tenders complete, and that such

of the said goods as should weigh above 20 cwt. should be put in the said steamer, stowed, taken out and landed at the shipper's risk and expense, was made by defendants, not with plaintiff alone, but with the partnership firm, consisting of plaintiff and defendants, as partners in the said speculation; and that the damages sustained by reason of the breaches complained of formed an item in the partnership accounts, and plaintiff's interest therein could not be ascertained without winding up the partnership accounts, which was not done before suit. 7. To the money counts. Never indebted.

Issues on all the pleas.

At the trial, before *Blackburn J.*, at the *Liverpool* Spring Assizes, 1860, it appeared that the plaintiff, having chartered the screw steamer *William France*, made a written agreement with the defendants to take out certain engines and tenders in her to *Barcelona*. There was some doubt whether the engines could be put on board through the hatchways; and the agreement contained a clause that, if that could not be done, the agreement should be void and at an end. After some discussion between the parties with reference to this clause and to certain alterations in the ship by removing some beams in the hatchways, which it was anticipated would be necessary in order to get the engines on board, and which were not expected to be great or to occupy much time, the agreement was cancelled, and a fresh agreement was drawn up, being the agreement declared upon. The steamer was then placed upon the berth in *Liverpool*. With the consent of her owner, the beams in the hatchways were removed, at the joint expense of the plaintiff and the defendants, and the engines, which exceeded 20 cwt. in weight, and so came within the provisions of

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clause 5 in the agreement, were brought alongside. It was then, within ten days of the steamer having been placed on the berth, found that, notwithstanding the removal of the beams, the engines would not go down the hatchways. The owner was thereupon applied to for his consent to having the hatchways widened, which he gave, on condition that the ship should be made right, before she sailed, to the satisfaction of *Lloyd's* surveyor. There was a conflict of testimony as to much of what ensued, but it was clear that the ship did not sail till she had lain on her berth twenty-three days, and that her delay there beyond the stipulated ten days was occasioned, first, by cutting the hatchways in order to get the engines on board, and, afterwards, by making the ship good, to the satisfaction of *Lloyd's* surveyor.

It was contended, for the defendants, that they were not liable, on the ground that the agreement constituted a partnership between them and the plaintiff.

The learned Judge overruled this objection, but gave the defendants leave to move to enter a nonsuit. He also directed the jury that the defendants had, by the 5th clause of the agreement, undertaken that the engines should be put on board at their risk and expense, without any saving clause to protect them in the event of that proving to be difficult; and that, therefore, any detention of the ship occasioned by alterations necessary to enable the engines to be put on board was detention by the defendants.

The jury found for the plaintiff for thirteen days' detention of the ship, at 20*l.* a day, making 260*l.*

Milward, in last *Easter* Term, obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered instead thereof

on the ground of the plaintiff being unable to sue at law on the agreement; or why a new trial should not be had, on the ground of the misdirection of the learned Judge in holding that the defendants were liable for any delay of the ship caused during the alterations needful to take the engines on board.

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Mellish shewed cause (a). Both points depend upon the construction of the agreement upon which the action is brought. As to the first, the question is, does or does not the agreement, properly construed, constitute a partnership between the plaintiff and the defendants? Now, the agreement is very inaccurately drawn: and although the 8th clause, stipulating that, in addition to any surplus of freight, "any loss which may result" is to be divided between the parties, looks at first sight as if the intention was to create a partnership, the substance of the agreement leads to the opposite conclusion. The plaintiff was the charterer of the ship, and the defendants had two engines and tenders which they wanted to send out in her to *Barcelona*. These not being sufficient to load the ship completely, it was necessary that an arrangement should be made for getting other goods in order to complete her cargo. The agreement now in question was entered into in furtherance of that object. By it 650*L.* was fixed as the whole sum which the plaintiff ought to receive for letting the whole of the ship. Out of this the defend-

(a) *Friday, June 22nd*, before *Wightman, Crompton, Hill* and *Blackburn Js.*; of whom *Wightman* and *Blackburn Js.* heard the whole of the argument, *Crompton* and *Hill Js.* different parts of it. See the judgment, *post*, p. 219.

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ants were to pay 240*l.* as freight for the engines and tenders, leaving 410*l.* to be obtained as freight for other goods. Both the plaintiff and the defendants were to endeavour to procure such further goods. It was not expected that more could be procured than would make up the whole freight receivable by the plaintiff to the 650*l.*; but, in order to meet every contingency, the 8th clause was inserted, by which, on the one hand, any excess, and, on the other, any deficiency, upon that sum (after crediting the defendants with 240*l.*), was to be divided between the plaintiff and the defendants. It is to this possible deficiency that the words "any loss which may result" refer. Throughout the agreement no trace of an intention by the parties to share the profit and loss of the whole adventure, in addition to that upon the freight, can be discovered. On the contrary, the 3rd clause provides that the plaintiff, receiving the lump sum of 650*l.*, is to pay all charges. If there was a partnership at all, it was limited to a partnership in the freight, and the 2nd clause in the agreement, for the breach of which the action was brought, is wholly collateral to and independent of any such partnership; the damages arising from such breach being sustained by the plaintiff exclusively, and not being matters to be brought into the joint account of profit and loss. The only ground, therefore, on which Courts of law have held that one partner cannot sue another, namely, that they possess no machinery for taking an account between the parties, is inapplicable to the present case. In the notes to *Waugh v. Carver* (a) the test for ascertaining

(a) 1 *Smith's L. C.* 833 (ed. 5.)

whether an actual partnership exists is thus stated. "Partnership is either *actual* or *nominal*. Actual partnership takes place when two or more persons agree to combine property, or labour, or both, in a common undertaking, sharing profit and loss. 'I have always,' says *Tindal C. J.*, in *Green v. Beesley*, 2 B. N. C. 112, 'understood the definition of partnership to be a mutual participation in profit or loss.' But with respect to third persons, an *actual* partnership may subsist where there is a participation in the *profits*, even though the participant may have most expressly stipulated against the usual incidents to that relation." In *Dixon v. Cooper (a)*, which was an action for not accepting 300 quarters of wheat, a factor for the plaintiff, who made the contract with the defendant, and was to have 1s. in the pound for selling the wheat, was the only witness at the trial who proved the contract. It being objected that he was not a competent witness, as being interested, the point was reserved for the opinion of the Court: and it was held that he was a good witness, being, as a factor, concerned both for the vendor and vendee as a mere go-between, and so a good witness for either of them. [*Wightman J.* That case is scarcely in point.] In *Dry v. Boswell (b)* an agreement between A., the sole owner of a lighter, and B., a lighterman, that B. should work the lighter, and in consideration thereof should have half her gross earnings, was held not to constitute a partnership between them, being only a mode of paying B. for his labour.

Secondly, as to the alleged misdirection. The learned

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(a) 3 Wils. 40.

(b) 1 Campb. 329.

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Judge properly directed the jury that the fifth clause of the agreement imposed upon the defendants the absolute responsibility of shipping the engines at their own risk and expense, and that they were therefore liable for any delay, however caused, in the process of shipment. They have detained the ship for their own exclusive purposes, beyond the stipulated ten days, and must therefore pay for the detention.

Milward and Crompton Hutton, in support of the rule. First: the agreement constituted a partnership between the plaintiff and the defendants. The transaction amounted to this: the plaintiff, being, *pro hac vice*, the owner of the steamer, and capable of letting her for any purpose, says to the defendants, "You have a house at *Barcelona*, and you want to send your engines and tenders out there; I am willing to join you in the speculation of sending them in my ship." The defendants accept this offer, and the agreement is entered into, by which the plaintiff is to be paid by the partnership a lump sum of 650*l.* for bringing the ship into the adventure, upon the condition that the profit or loss of the adventure beyond or below that sum is to be shared equally between the partners. The stipulation that the plaintiff was to pay all charges meant no more than that he was to contribute to the partnership the sailing expenses as so much capital. In an action against third persons for not shipping goods on the steamer, supposing them to have contracted to ship them, the plaintiff must have joined the defendants as co-plaintiffs, or he would have been nonsuited. [*Wightman J.* Suppose that goods had been shipped, the freight of which would, with the

240*l.* paid by the defendants, have amounted to exactly 650*l.* In that case the defendants would have had nothing further to pay or to receive.] It may happen, in any partnership, that the outgoings exactly equal the incomings; but such a state of things does not affect the nature of the partnership. Moreover, the 240*l.* to be paid at *Liverpool* by the defendants is a partnership item paid by them in advance; they would have been entitled to a return of it had the ship not performed the voyage; and the plaintiff, being their partner, could not have sued them for it if unpaid. [*Crompton J.* Supposing the right construction of the second clause to be, that the defendants should not require the ship to remain on the berth more than ten days, how can the damages arising from her detention beyond that time be a partnership item?] The money paid by the defendants on that score would go into the general accounts of the partnership. The right construction, however, is that the partnership shall not require the detention. [*Blackburn J.* To whom do you say that the 240*l.* was payable under the 4th clause?] To the partnership. The agreement was, in effect, that the plaintiff should contribute the ship, not to the defendants alone, but to the partnership; and the defendants were to pay the 240*l.* to the partnership, as an equivalent contribution on their part. Clauses 7 and 8 relate to the joint management of the speculation by the partnership. By clause 9, the plaintiff, who must be meant by "the steamer," guarantees to the partnership that the steamer is of a certain capacity. Clause 10 makes the plaintiff's office the office of the partnership, for carrying out the speculation. Clause 11, by which the steamer is to be consigned at

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214 *Baroness to the friends of the defendants, shews that*
the parties knew how to word the agreement directly
in favour of one of them, when that was their intention.
1892 *Secondly: the learned Judge misdirected the jury, in*
ELLEN *ruling that the defendants were liable for every delay in*
V. *shipping the engines, however occasioned; for it was no*
HALLEBA *part of the duty or obligation of the defendants to make*
alterations in the ship, which did not belong to them,
so as to fit her to receive their goods. In the case of an
ordinary contract for the carriage of goods in a ship,
it is the duty of the shipowner to have the ship in a
fit condition for taking them on board. The shipper
brings the goods to the quay, and the shipowner takes
them on board from there. He is responsible for
risks of stowage, the sufficiency of tackle, and so forth.
The 5th clause of the agreement modified this responsi-
bility, which would otherwise have fully devolved upon
the plaintiff, to this extent, that all goods exceeding
20 cwt. in weight were to be put on board and stowed
by the defendants. But that clause did not require the
defendants to make alterations in the ship, in order to
fit her for receiving the goods when brought on board;
nor did it relieve the plaintiff from his implied promise
that the ship was fit for their reception. Lord Ellen-
borough C. J., in delivering the judgment of this Court
*in *Lyon v. Mells*(a), said, "In every contract for the*
carriage of goods between a person holding himself forth
as the owner of a lighter or vessel ready to carry goods
for hire, and the person putting goods on board or
employing his vessel or lighter for that purpose, it is a

(a) 5 East, 428. 437.

term of the contract on the part of the carrier or lighterman, *implied by law*, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public: it is the very foundation and immediate substratum of the contract that it is so: the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so." As the ship, here, required alteration, before she could stow the engines, the plaintiff committed a breach of this implied promise, and he, not the defendants, was responsible for the consequent delay. [Wightman J. The bargain was that the defendants were to stow the engines. It turned out that they could not be stowed unless the ship was altered. Both parties knew, before the agreement was made, that some alteration would be requisite.] Had it been intended that the defendants were to make the alterations, there would have been an express stipulation in the agreement to that effect.

Mellish was heard in reply on the point as to the misdirection.

Cur. adv. vult.

BLACKBURN J. now delivered the judgment of the Court.

This was a case tried before me at the last *Liverpool Assizes*. The plaintiff *Blech* was charterer of the steam ship *William France* for six months. The plaintiff had made an agreement in writing with the defendants to carry in the ship some engines and tenders to *Barcelona*.

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In that agreement was contained a clause that, if the engines could not go through the hatchways, the agreement was to be void. Some discussion arose between the plaintiff and defendants as to this agreement, from which it appears that it was known to both parties that it was doubtful whether the engines could be got on board without making some alterations in the ship; but that it was anticipated that the necessary alterations would consist in removing some beams, and would not be great, or occupy much time. The result of these negotiations was, that the former agreement between the plaintiff and defendants was cancelled and a fresh agreement in writing drawn up, on the construction of which the present cause depends. It was in the following terms: "The following conditions have this day, 5th December, 1859, been agreed upon between Messrs. *Balleras & Co.*, of *Liverpool*, and Messrs. *Blech & Co.*, the charterers of the screw steamer *William France*, also of *Liverpool*. 1st. That Messrs. *Blech & Co.* should lay the steamer *William France* on the berth in *Liverpool*, for *Barcelona*, on her arrival here from *London*, after having discharged her cargo. 2nd. The said steamer should not be required to lie on her berth longer than ten days. 3rd. That she should make the voyage from here to *Barcelona* for the lump sum of 650*l.*, charterers to pay all charges. 4th. That Messrs. *Balleras* should load in the steamer two engines and tenders complete, for 240*l.*: freight to be paid here, on delivery of bills of lading, without any deduction for interest or insurance. 5th. Such of the above goods that weigh above 20 cwt. shall be put in the steamer, stowed, taken out and landed at the shipper's risk and

expense. 6th. The said goods should be taken out of the steamer, as soon as the captain is ready to deliver them, in five days, *Sunday* excepted, and 20*l.* sterling demurrage to be paid by the shipper or receiver of the above named goods, for every day she is detained over and above five days. 7th. That the steamer should be entered in the joint names of Messrs. *Blech & Co.* and *Balleras & Co.*, so that the latter may assist to get cargo. 8th. Any surplus of freight above 650*l.* should be divided between Messrs. *Balleras & Co.* and *Blech & Co.*, and also any loss which may result. 9th. That the said steamer should guarantee to carry 480 tons dead weight, besides 40 tons of coal in the bunkers. 10th. The bills of lading for the whole cargo of the said steamer to be signed at the office of Messrs. *Blech & Co.* 11th. The steamer to be consigned, at *Barcelona*, to the friends of Messrs. *Balleras & Co.*, paying 2 per cent. commission on the above freight." The action was brought, on the 2nd clause of the agreement, for detaining the ship longer than ten days. One point made at the trial was that the agreement was a partnership agreement on which no action lay at law; and leave was reserved to enter a nonsuit if this was so. The defendants also complain of misdirection; and it is necessary to state so much of the evidence as will explain the direction complained of. *The William France* arrived at *Liverpool*; she was put on the berth. The beams in the hatchway were, by consent of the owner of *The William France*, removed, at the joint expense of the plaintiff and defendants; and the engines were brought alongside. They exceeded 20 cwt., so as to come within the provisions contained in the 5th clause of the agreement.

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It was found that, notwithstanding the removal of the beams, the engines could not go down the hatchway. This was before the ten days had expired. The consent of the owner of *The William France* was given to widen the hatchway, so as to let the engines go down in the hold; but he made it a condition on his giving his consent, that the ship should be made right before she sailed, to the satisfaction of *Lloyd's* surveyor. There was a conflict of testimony as to much of what ensued: but it was clear that the ship did not sail till twenty-three days after she lay upon her berth, and there was evidence on which the jury were warranted in finding that the ship was detained during the period beyond the ten stipulated days, for the purpose, first, of cutting the hatchways in order to put those parts of the engines which exceeded 20 cwt. into the ship, and afterwards for the purpose of making good the ship to the satisfaction of *Lloyd's* surveyor. The jury were told that the shippers, that is the defendants, had, by the 5th clause of the agreement, undertaken that these parts of the engines should be put on board at their risk and expense; without any saving clause to protect them, in the event of that proving to be difficult; and that, therefore, any detention of the ship occasioned by alterations in the ship necessary to effect this was detention by the defendants. The jury found for the plaintiff for thirteen days' detention at 20*l.* a day, making 260*l.* A rule nisi has been obtained to enter a nonsuit on the point reserved; or for a new trial on the ground of misdirection of the learned Judge who tried the cause, in holding that the defendants were liable for any delay of the ship caused during the alterations needful to

take the engines on board. The case was argued in the Sittings after this Term. My brother *Wightman* and I heard the whole of the argument. My brother *Crompton* heard that portion of the argument which related to the point reserved; but not the argument as to misdirection. By brother *Hill* heard the argument as to the misdirection, but not the argument as to the point reserved. Both points depend upon the construction of the document. It may be that a partnership to some extent is constituted by the agreement as to the freight; but we think that, on the true construction, the 2nd clause is an agreement between the shippers (the defendants) and the plaintiff (the person who alone was interested in the speedy sailing of the ship) that the plaintiff's ship should not be required by the defendants to lie on her berth more than ten days; and that this agreement was collateral to and independent of any partnership in the freight, the damage arising from any breach of it being solely to the plaintiff, and in no way to be brought into the account of profit and loss. If that be so, the action will lie, and there is no ground for entering a nonsuit. The question as to misdirection remains for consideration. It was contended on the part of the defendants that it was the implied agreement of the plaintiff, as furnishing the ship, that she should be made fit to receive on board the engines; in which case the detention was for the purpose of supplying that which the plaintiff had engaged to supply, and could not be said to be caused by the defendants. If this was so there was a misdirection, and one on a point going to the whole merits. But we think that the parties, knowing that there was a doubt as to whether

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the engines would go on board, and that there might be difficulty and expense in shipping them, have agreed that the shippers should take on themselves all the expense and risk of putting them in and stowing them. If it should prove impossible to put them in the ship, the defendants, having taken upon themselves absolutely to do so, must pay damages for not fulfilling their contract. If there is delay or expense incurred in fulfilling it, it is incurred by the defendants. We think therefore that the ruling complained of was right, and the rule must be discharged on both grounds.

Rule discharged.

END OF TRINITY VACATION.

CASES

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ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

MICHAELMAS TERM,

XXIV. VICTORIA.

The Judges who usually sat in Banc in this Term
were:

COCKBURN C. J.

WIGHTMAN J.

|

HILL J.

BLACKBURN J.

BAMFORD *against* TURNLEY.

*Monday,
November 5th.*

[Reported, in the Queen's Bench and in the Exchequer
Chamber on error from that Court, 3 B. & S. 62.]

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Thursday,
November 8th.

Ex parte The Mayor of BIRMINGHAM.

The Municipal Corporations Reform Act, 5 & 6 W. 4. c. 76. s. 57. enacts "That the mayor for the time being of every borough shall be a justice of the peace of and for such borough, and shall continue to be such justice of the peace during the next succeeding year after he shall cease to be mayor;" "and such mayor shall, during the time of his mayoralty, have precedence in all places within the borough."

Held, that this section refers to social, not magisterial, precedence; and therefore does not entitle a mayor, during his mayoralty, to take precedence and to preside at all meetings of the borough justices, held in the borough, at which a chairman is required.

SIR W. ATHERTON, Solicitor General, moved, on behalf of *Thomas Lloyd*, the Mayor of the borough of *Birmingham*, for a rule calling on the justices of the peace for that borough to show cause why a mandamus should not issue, commanding them to permit him, as Mayor for the time being, to take precedence and to preside at all meetings of the justices to be held within the borough, at which a chairman should be required.

The affidavits shewed that in 1839 a separate commission of the peace was granted to the borough; that in 1859 the justices of the borough refused to allow the then Mayor to preside at their meetings; and that, in the present year, they had refused to permit the applicant to preside, as Mayor for the time being, at the gaol sessions, or any official meetings of the justices, and another magistrate had been voted to the chair.

The *Solicitor General*, for his rule. The question whether the Mayor has the right of precedence which he claims, turns upon the construction to be given to The Municipal Corporations Reform Act, 5 & 6 W. 4. c. 76. s. 57., which enacts "That the Mayor for the time being of every borough shall be a justice of the

the borough justices, held in the borough, at which a chairman is required.

peace of and for such borough, and shall continue to be such justice of the peace during the next succeeding year after he shall cease to be Mayor;" "and such Mayor shall, during the time of his mayoralty, have precedence in all places within the borough." Under this section the Mayor is entitled to precedence at the meetings of the justices at which he is present as a justice, no less than in all other places at which he is present while he holds his office. There is nothing in the language of the statute to limit the meaning of precedence to social precedence. [*Wightman J.* Is there any authority for the issuing of a mandamus of the kind you ask for?] In *Ex parte Farnall* (a) this Court made absolute a rule for a mandamus to the directors and guardians of the parish of *St. Marylebone*, to admit the applicant, an Inspector appointed by the Poor Law Board, to attend their meetings, in pursuance of stat. 10 & 11 *Vict. c.* 109. s. 20. (b). [*Wightman J.* In that case the defendants had prevented the applicant from performing his statutory duty to attend the meetings.] Sect. 57 of The Municipal Corporations Reform Act imposes upon the Mayor the duty of presiding, *ex officio*, over the borough justices. [*Wightman J.* The Mayor may have had no previous experience as a justice; and it would be very inconvenient if an inexperienced person had the right to preside over others better qualified.]

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Ex parte
Mayor of
BIRMINGHAM.

COCKBURN C. J. There can be no rule. We think

(a) Not reported. The rule nisi was obtained on 22nd *May*, and made absolute on 11th *June*, 1856, no cause being shewn.

(b) Which enacts, that the inspector "shall be entitled to" "attend every Board of guardians and every parochial and other local meeting held for the relief of the poor, and to take part in the proceedings, but not to vote at such Board or meeting."

1860. that the section in question of the Act of Parliament applies only to the social, not to the magisterial, precedence of the Mayor.

Ex parte
Mayor of
BIRMINGHAM.

WIGHTMAN, HILL and BLACKBURN Js. concurred.

Rule refused.

Friday,
November 9th.

SCHLUMBERGER against LISTER.

[Reported, 2 E. & E. 870.]

Saturday,
November 10th.

THE QUEEN, on the Prosecution of the Guardians of the Poor of the STRAND Union, respondents, against The Overseers of the Poor of the parish of ST. GILES IN THE FIELDS, appellants.

On 17th October, 1854,
J. R., who was
then eighteen
years old and

CASE stated by consent and by Judge's order, under stat. 12 & 13 Vict. c. 45., on an appeal to Sessions

living, unemancipated, with his father, T. R., in the parish of A. in the S. Union, removed as a lunatic pauper to an asylum, where he had since continued. At that time both T. R. and J. R. had resided in A. for more than the five next preceding years. T. R. continued to reside there till 1857, when he left, and had not since returned. T. R.'s settlement, both on and since 17th October, 1854, was in the parish of J. R. was maintained in the asylum from that date, at the cost of the S. Union, until it being discovered that T. R. had left A., an order of justices was, on 11th October, 1857, made under stat. 16 & 17 Vict. c. 97 s. 97., adjudging J. R. to be settled in G., ordering G. to pay the preceding twelve months' expenses of his maintenance, and a weekly sum for his future support. Sect. 102 of that Act provides that all expenses incurred for the removal, maintenance, &c. of a pauper lunatic removed to an asylum "who would at the time of his being conveyed to such asylum" "have been exempted from removal to the parish of his settlement" "by reason of some provision in" 9 & 10 Vict. c. 66., "shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption," "and where such parish shall be comprised in the S. Union the same shall be paid by the guardians, and be charged to the common fund of such Union;" "and no order shall be made under any provision" "in this" "Act on the parish of the settlement in respect of any such lunatic pauper."

On a case stated for this Court on an appeal to Sessions by G. against the order

against an order of removal, dated 11th *October*, 1859, by which *James Randall*, a pauper lunatic, was adjudged to be settled in the parish of *St. Giles in the Fields*, and the guardians of the poor of that parish were ordered to pay 34*l.* 10*s.* 11*d.* to the guardians of the *Strand Union*, being the amount of expenses incurred by the latter in the maintenance of the lunatic within twelve calendar months before the making of the order; and also 10*s.* weekly for the future support of the said lunatic in an asylum.

On 17th *October*, 1854, the said *James Randall*, who was then eighteen years of age, and living, unemancipated, with his father, *Thomas Randall* (who is still alive) in the parish of *St. Anne, Westminster*, in the *Strand Union*, having become insane, was removed to the county lunatic asylum, under the authority of the Act in that behalf, and has been maintained therein ever since as a pauper lunatic. He never gained a settlement in his own right. At the time of his removal, his father was settled in the parish of *St. Giles*, which settlement he still retains. The father and the lunatic son, who lived with him as part of his family, had each resided in *St. Anne's* parish for five years and upwards next before 17th *October*, 1854. The father continued to reside in that parish until three years ago, when he left the parish without any intention of returning, and has not since returned. After the lunatic had been sent to the asylum, and down to 15th *September*, 1859, his maintenance was charged to the common fund of the *Strand Union*; but after that day, on which it was discovered that his father had left *St. Anne's* parish, the costs of such maintenance were, as to the twelve months preceding the said 15th *September*, transferred and for the future

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11th *October*,
1859: Held,
that stat.
16 & 17 *Vict.*
c. 97. s. 102.
applied, and
the order was
therefore bad.
That *J. R.*
was, at the
time of his
being con-
veyed to the
asylum, ex-
empt from
removal to *G.*
by reason of
a provision in
stat. 9 & 10
Vict. c. 66.
with which
the amending
statute 11 & 12
Vict. c. 111.
was to be
read as one:
and had him-
self, though
not sui juris,
acquired such
exemption
in *A.*

1860. charged to the parish of *St. Anne*. On 11th *October*,
 The QUEEN 1859, the order appealed against was made, under stat.
 v. 16 & 17 *Vict. c. 97. s. 97*. The part of the expenses
 Overseers of St. GILES. ordered to be paid, which was incurred between 15th
September and 11th *October*, 1859, amounted to 2*L*

It was contended, on the part of the appellants, that the lunatic was, at the time of his being conveyed to the asylum, exempt from removal to the parish of his settlement, by reason of a provision in stat. 9 & 10 *Vict. c. 66.*; that, under stat. 16 & 17 *Vict. c. 97. s. 102.*, the order ought not to have been made and that the lunatic ought to continue to be maintained in the asylum out of the common fund of the *Strand* Union; and that, if any such order ought to have been made, it ought not to have directed the payment of expenses incurred before the date of it; or at all events, ought not to have directed the payment of expenses incurred before 15th *September*, 1859.

On the part of the respondents it was contended that, if the lunatic was exempt from removal as alleged by the appellants, he, being, as the respondents contended, unemancipated when his father left the parish of *St. Anne*, and having no other settlement than that of his father, ceased to be exempt from removal by reason of any provision of stat. 9 & 10 *Vict. c. 66.*; and that the order was properly made in its terms, upon the parish wherein the lunatic was settled.

The questions for the opinion of the Court were, First, whether any order could be lawfully made on the parish of *St. Giles*, for payment of expenses for the maintenance, &c. of the lunatic in the asylum; Secondly, whether, assuming such an order might have been made any order might be made for the payment of past ex

penses; Thirdly, whether all the expenses incurred during the twelve months next before the order, or such part only as were incurred since 15th *September*, 1859, might be directed to be paid.

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If the first question was answered in the negative, the order was to be quashed. If that question was answered in the affirmative, the order was to be confirmed or amended according as required by the answers to the other questions.

Poland, for the respondents. First, the order was rightly made on the appellants. By stat. 16 & 17 *Vict. c. 97. s. 97.*, justices are empowered at any time to inquire into and adjudge the settlement of a pauper lunatic who is in confinement in an asylum, and to order the guardians of the union or parish of settlement to pay the expense incurred for the lunatic's maintenance and otherwise. Then follows sect. 102, upon the construction of which the question in the present case depends, and by which it is enacted "That all the expenses incurred since 29th *September*, 1853, or hereafter to be incurred, in and about the examination, bringing before a justice or justices, removal, lodging, maintenance, medicine, clothing, and care of a pauper lunatic heretofore or hereafter removed to an asylum, registered hospital, or licensed house under the authority of this or any other Act, who would, at the time of his being conveyed to such asylum, hospital, or house, have been exempt from removal to the parish of his settlement or the country of his birth by reason of some provision in" stat. 9 & 10 *Vict. c. 66.*, "shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption if such parish be subject to a separate board

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of guardians, or by the overseer of such parish where the same is not subject to such separate board, and where such parish shall be comprised in any Union the same shall be paid by the guardians, and be charged to the common fund of such Union so long as the cost of the relief of paupers rendered irremovable by the last-mentioned Act shall continue to be chargeable upon the common funds of Unions; and no order shall be made under any provision contained in this or any other Act on the parish of the settlement in respect of any such lunatic pauper during the time that the above mentioned charges are to be paid and charged as herein provided; and sect. 5 of" stat. 12 & 13 *Vict. c. 103.* "shall be repealed." This section does not apply at all to such a case as the present, where the lunatic pauper is an unemancipated child; but only to cases where the lunatic has acquired the status of irremovability, under stat. 9 & 10 *Vict. c. 66.*, in his or her own capacity, and not through a father or a husband. The words "wherein such lunatic shall have acquired such exemption" point to a direct acquisition by the lunatic in person. [*Blackburn J.* Does not a child living with his father when the father becomes irremovable, also become exempt from removal, "by reason of some provision in stat. 9 & 10 *Vict. c. 66.*"?] No: the child is rendered irremovable, in such a case, by the later Act, 11 & 12 *Vict. c. 111. s. 1.* And it becomes exempt from removal solely in consequence of the father's residence for five years in a parish; the length of the child's residence there while unemancipated, which in the present case happens to have extended to five years, being immaterial. But, further: assuming that stats. 9 & 10 *Vict. c. 66.* and 11 & 12 *Vict. c. 111.* are to be read as one, and that an unemancipated

child, or a wife, can be said to acquire the status of irremovability by reason of the father or husband becoming irremovable; that status is only temporary, and conditional upon its retention by the father or husband; *Regina v. St. Ann, Blackfriars*(a), *Regina v. Cudham*(b).

Now the case finds that the father of the lunatic has left *St. Anne's* parish; so that, should he return there, he would be removable. It follows that his son, the lunatic, is now removable. [*Blackburn J. Stat. 16 & 17 Vict. c. 97. s. 102.* renders it immaterial whether or not the lunatic is now removable. The section applies if, as in the present case, he was exempt from removal to the parish of his settlement at the time of his being conveyed to the asylum.] In order that the section may receive a reasonable construction, the conveyance of the lunatic to the asylum may be supposed to take place, constructively, from week to week; the order under *stat. 16 & 17 Vict. c. 97.* directing the payment for his maintenance, &c., to be made week by week. Light is thrown on the intention of the Legislature by the language of the earlier statute *11 & 12 Vict. c. 110.*, an Act passed for one year but afterwards continued; by *sect. 3* of which it was enacted that, for the year in question, "all the costs incurred in the relief, as well medical as otherwise, of any poor person, who, not being settled in the parish where he resides, shall, by reason of some provision in" *stat. 9 & 10 Vict. c. 66.* "be or become exempted from the liability to be removed from the parish where he resides, shall, where the said parish shall be comprised in any" "Union," "be charged to the common fund of such Union, so long as such person shall continue to be

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(a) 2 E. & B. 440.

(b) 1 E. & B. 409.

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so exempted." And stat. 12 & 13 *Vict. c. 103. s. 5.*, for which stat. 16 & 17 *Vict. c. 97. s. 102.*, is now substituted, enacted, "That all the costs and expenses incurred or hereafter to be incurred, since the 25th day of *March* last in and about the obtaining any order of justices for the removal and maintenance of a lunatic pauper who shall have been or shall be removed under any such order to any asylum, licensed house, or registered hospital, and who, if not a lunatic, would have been exempt from removal by reason of some provision in" stat. 9 & 10 *Vict. c. 66.*, "shall, until the time when the provisions hereinbefore contained shall cease, be borne by the common fund of the Union comprising the parish wherein such pauper lunatic was resident at the time when such lunatic pauper was so removed to such asylum, licensed house, or registered hospital, notwithstanding the order for the payment thereof shall have been made upon the overseers of such parish, or the parish of the settlement, or upon the treasurer or guardians of the Union in which either parish shall be comprised." Stat. 16 & 17 *Vict. c. 97. s. 102.* is the first enactment which, even *primâ facie*, appears to impose a permanent liability on the parish from which the lunatic was irremovable at the time that he was conveyed to the asylum. [*Blackburn* J. The last enactment was passed, no doubt, in order to remedy the restricted operation of stat. 12 & 13 *Vict. c. 103. s. 5.*; which statute, as was decided in *Regina v. St. Leonards, Shoreditch (a)*, applied only where the lunatic had been removed under an order of justices. The new Act applies to all removals under the authority of an Act of Parliament, and points out the time of re-

(a) 14 Q. B. 340.

moval as that which is to determine the liability of the parish of residence.] Next, as to the expenses which the order might properly direct to be paid. [*Keane*, contra, here stated that he gave up the last two points relied upon by the appellants.]

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Keane, for the appellants. The order is bad. Stat. 9 & 10 *Vict. c. 66. s. 1.* enacts that "no person shall be removed" "from any parish in which such person shall have resided for five years next before the application for" a warrant for removal. An unemancipated child, living with its father, is a "person," and can acquire the status of irremovability through him; *Regina v. Elvet (a)*. The lunatic in the present case had, therefore, at the time of his being conveyed to the asylum, which is the only time to be considered in construing stat. 16 & 17 *Vict. c. 97. s. 102.*, acquired, in *St. Anne's* parish, exemption from removal. The only point on which the respondents can rely is, that the exemption was not acquired by reason of some provision in stat. 9 & 10 *Vict. c. 66.*, because the lunatic was irremovable by reason of the later Act, 11 & 12 *Vict. c. 111.* That Act, however, was passed merely, as the preamble states, in order to remove doubts which had arisen from the generality of the expressions in one of the provisoes of the former; which proviso it substantially re-enacts, with a slight change in the phraseology. The two Acts must clearly be read together as one. (He was then stopped by the Court.)

COCKBURN C. J. The whole force of the argument for

(a) 2 E. & E. 266.

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the respondents rests on the assumption that the proviso re-enacted by stat. 11 & 12 *Vict. c. 111. s. 1.* is not to be considered as part of stat. 9 & 10 *Vict. c. 66.*; for if that is so, the lunatic was not exempt from removal from *St. Anne's* parish by reason of some provision in stat. 9 & 10 *Vict. c. 66.*, and stat. 16 & 17 *Vict. c. 97. s. 102.* did not, therefore, apply. I, however, think that the two statutes, 9 & 10 *Vict. c. 66.* and 11 & 12 *Vict. c. 111.*, are to be read as one: the latter merely substituting, for a proviso in the former, another couched in clearer and less general language, but identical in purport. The order of removal was therefore bad, as being in contravention of stat. 16 & 17 *Vict. c. 97. s. 102.*; and it must be quashed.

(WIGHTMAN and HILL Js. were absent.)

BLACKBURN J. I am of the same opinion. By stat. 16 & 17 *Vict. c. 97. s. 102.* it is enacted as follows. [His Lordship read the section.] One question therefore is whether this lunatic pauper had, at the time of his being conveyed to the asylum, acquired exemption from removal, by reason of some provision in stat. 9 & 10 *Vict. c. 66.* Now sect. 1 of that statute enacted that no person should be removed from a parish after residing in it for five years; and contained a proviso which was intended to mean that, whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable or not removable from any parish or place according as he or she would or would not be removable therefrom. This meaning, however, being somewhat vaguely expressed, stat. 11 & 12 *Vict. c. 111.* was passed with the simple

object of substituting a clearer form of proviso to precisely the same effect. I think, therefore, that the two statutes must fairly be read as one. The remaining question is, whether the lunatic, being then an unemancipated child living with an irremovable father, could be said, at the time of his being conveyed to the asylum, to have himself "acquired" the exemption from removal, within the meaning of stat. 16 & 17 Vict. c. 97. s. 102., he being then not sui juris. As to this, I agree with Mr. *Keane*, that he had then "acquired" the exemption; and I think that *Regina v. Elvet* (a) is an authority in favour of that view. Whether it was the intention of the Legislature that a parish or union should continue to be chargeable with the maintenance of a lunatic pauper child after its father had ceased to be irremovable therefrom, or whether this is a casus omissus in the Act, it is not for us to determine.

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Order quashed.

(a) 2 E. & E. 266.

SOMMERVILLE v. MIREHOUSE.

Tuesday,
November 13th.

[Reported, 1 B. & S. 652.]

1860.

Wednesday,
November 14th.

EMBLETON, appellant, against BROWN, respondent.

The part of the sea shore comprised between high and low water mark forms part of the body of the adjoining county, the justices of which, and not the Admiralty, have jurisdiction to take cognizance of offences there committed, whether or not committed when the shore is covered with water.

CASE stated by justices, under stat. 20 & 21 *Vict.* c. 43.

At the Petty Sessions held in and for the east division of *Croquetdale Ward*, in the county of *Northumberland*, on 3rd *March*, 1860, an information came on for hearing before the justices, of which the following is a copy, so far as is material.

"*Northumberland* } The information of *George Embleton*,
(to wit.) } of *Warkworth*, in the county of
Northumberland, made upon oath before " &c., "on " &c.; "who saith, that *Henry Brown*, of *Cresswell*, in the said county, fisherman, on 19th *November* last, at the township of *Amble*, in the parish of *Warkworth*, in the county aforesaid, did then and there unlawfully attempt to take certain fish, to wit, salmon trout, in certain water there called *The Stell Fishery*, in which His Grace the Duke of *Northumberland* then had a private right of fishery for salmon and fish of the salmon kind, and such water not running through or being in any land adjoining or belonging to the dwelling house of the said Duke; contrary to the form of the statute in such case made and provided.

"Sworn," &c.

This information was laid under stat. 7 & 8 *G.* 4. c. 29. s. 34. The prosecutor and the above named respondent (hereinafter called "the defendant") appeared at the hearing, by adjournment, on 7th *April*, 1860. The

facts were admitted by the defendant to be correctly **laid** in the information, with this exception, that the **place** where the offence was committed was the sea **shore**, between high and low water mark at ordinary **tides**, and was, at the time the offence was so committed, **covered** by the sea. At low water this place was dry land.

Upon this evidence it was contended, on the part of **the** prosecutor, that, notwithstanding that circumstance, **the** place where the offence was committed was within **the** body of the county, and therefore within the **jurisdiction** of the justices. On the part of the **defendant** it was argued that it was only within the jurisdiction **of** the justices when it was low water, but when the **tide** was full it then ceased to be so, and was then within **the** jurisdiction of the Admiralty.

Upon this state of doubt, the justices dismissed the **information** for want of jurisdiction.

The question for the opinion of the Court was, **whether** their determination that they had no jurisdiction **was** or was not right in law.

If the Court should be of opinion that their determination was wrong, the justices requested the Court to **remit** the matter to them with the opinion of the **Court** thereon accordingly; or to make such other order **in** relation to the matter as to the Court should seem **meet**.

Manisty, for the appellant. The question is whether **the** jurisdiction of the justices of a county extends over **that** portion of the sea shore, adjoining the county, **which** is between high and low water mark. *Regina v. Musson* (a) shews that the portion of the sea shore in

(a) 8 E. & B. 900.

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question is within the body of the county, although there is no *prima facie* presumption that it forms part of the parish coming down to the shore. The justices therefore, in the present case, clearly had jurisdiction to take cognizance of the offence. Stat. 7 & 8 G. 4. c. 29. s. 34., under which the information was laid, makes it an offence punishable by conviction to "unlawfully and wilfully" "attempt to take or destroy any fish in any water" "in which there shall be any private right of fishery": and it must be taken upon the facts stated in the case that the Duke of *Northumberland* had a private right of fishery in the part of the sea where the respondent took the salmon trout. [*Cockburn* C. J. Assuming the place in question to be open sea, could the Crown have granted, at any time, an exclusive right of fishery in it?] Before *Magna Charta* the Crown had power to make such a grant. *Bagot v. Orr* (a) shews that there may be an exclusive right of fishing for salmon in the open sea — as far as low water mark. The only matter for the consideration of the Court is whether or not the sea shore between high and low water mark is within the body of the adjacent county: if so, the Admiralty cannot have no jurisdiction over it. The law is expressly laid down to that effect in 4 *Inst.* 134, where Lord *Coke* says that to the objection "That whereas the consueance of a contracts and other things done upon the sea belonget to the admirall jurisdiction, the same are made triable the common law, by supposing the same to have been done in *Cheapside*, and such places," the answer is that "By the lawes of this realm the Court of the admir hath no consueance, power, or jurisdiction of any manne"

(a) 2 B. & P. 472.

of contract, plea, or querele within any county of the realm, either upon the land or the water: but every such contract, plea, or querele, and all other things rising within any county of the realm, either upon the land or the water, and also wreck of the sea, ought to be tried, determined, discussed, and remedied by the lawes of the land, and not before, or by the admirall nor his lieutenant in any manner. So as it is not materiall whether the place be upon the water *infra fluxum et refluxum aquæ*: but whether it be upon any water within any county."

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No counsel appeared for the respondent.

COCKBURN C. J. We must assume that the justices were satisfied of the fact that the Duke of *Northumberland* had the exclusive right of fishing in the sea at the place where the offence was committed; and that the only question submitted to us is whether or not they had jurisdiction to take cognizance of offences committed in the part of the sea, adjoining their county, comprised between high and low water mark. *Regina v. Musson* (a) appears to be a direct authority that such part of the sea is within the body of the adjoining county. It follows that the justices had, and ought to have exercised, jurisdiction in the matter; which must therefore be remitted to them.

(WIGHTMAN J. was absent.)

HILL and BLACKBURN Js. concurred.

Judgment for the appellant. Case remitted to the justices.

(a) 8 E. & B. 900.

1860.

Wednesday,
November 14th.

CLEMENTS, appellant, against SMITH, responder

The General
Turnpike Act,
3 G. 4. c. 126.

enacts, by
sect. 32, "that
no toll shall
be demanded
or taken" "on
any turnpike
road, for"
"any horse,
beast or other
cattle or car-
riage employed
in carrying or
conveying,
having been
employed only
in carrying
or conveying
on the same
day," "any
hay, straw,
fodder for
cattle, and
corn in the
straw, which
has grown or
arisen on land
or ground in
the occupation
of the owner
of any such
hay, straw,
fodder or corn
in the straw,
potatoes or
other agri-
cultural produce,
and which has not been bought, sold or disposed of, nor is going to be sold or disposed of."

A horse and cart passed through a toll-gate, carrying threshed barley, which had grown on land in the occupation of the owner, to a mill to be ground into meal for feeding the owner's pigs. They repassed on the same day laden with barley-meal obtained from the mill, the produce of another parcel of barley grown by the same owner on the same land, and previously sent to be ground into meal for the same purpose. The horse and cart had not been employed in any other way on the same day. Held, that they were exempt from toll under the above enactment on each journey: for that both the barley and the barley-meal came within the description of "fodder for cattle."

CASE stated by justices, under stat. 20 & 21 v. c. 43.

At a Petty Sessions holden at *Rockford*, in the county of *Essex*, on 23rd *February*, 1860, an information was preferred by the appellant, a toll collector, against the respondent, charging that he, on 16th *January*, 1860, at *Hockley*, in the said county, did claim and take the benefit of a certain exemption from toll payable at a certain turnpike gate there situate; he then arrived there not being entitled to the same; contrary to the form of the statute in such case made and provided.

By stat. 3 Geo. 4. c. 126. s. 36. (The General Turnpike Act), it is enacted "That if any person or persons shall, by any fraudulent or collusive means whatsoever claim or take the benefit of any exemption from toll from overweight, or for using any additional horse or horses, or of any other exemption or exemptions whatsoever in this Act contained, every such person shall for every such offence forfeit and pay any sum not exceeding 5*l.*; and in all cases the proof of exemption shall be

sold or disposed of."

upon the person claiming the same." By sect. 32 it is enacted "That no Toll shall be demanded or taken by virtue of this or any other Act or Acts of Parliament, on any turnpike road, for " (inter alia) "any horse, beast or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day" (inter alia) "any hay, straw, fodder for cattle, and corn in the straw, which has grown or arisen on land or ground in the occupation of the owner of any such hay, straw, fodder or corn in the straw, potatoes or other agricultural produce, and which has not been bought, sold or disposed of, nor is going to be sold or disposed of."

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The appellant proved that the respondent, on the day in question, came to one of the toll gates of the *Essex* Turnpike Trust with a horse and cart, and claimed to pass, and did pass, through without payment of toll, alleging that he was carrying threshed barley to the mill to be ground into meal for his master's pigs; and that, on his return laden, he again claimed to pass, and did pass, through the same gate without payment of toll, on the ground that he was laden with barley-meal to be used as food for his master's pigs. It was proved on behalf of the respondent that, at the time of the alleged offence, he was the servant of a Mr. *Wood*, an occupier of land at *Rochford* and *Hawkevell*; that the barley which the respondent was conveying was grown on his master's farm, whence it was taken to the mill to be ground into meal for feeding pigs upon the farm; that, on his return from the mill, his cart was laden with barley-meal delivered to him at the mill as the produce of another parcel of his master's barley, grown on the said farm, which had been previously sent to be ground; that

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the said meal was afterwards actually consumed by his said master's pigs on his said land; and that the said horse and cart had not been employed in any other way during the same day.

On these facts the justices decided that the barley and barley-meal were both "fodder for cattle," within the meaning of stat. 3 G. 4. c. 126. s. 32.; and further, that, if not "fodder for cattle," they were "agricultural produce" grown on the lands of the owner, and not bought, sold, or disposed of, or going so to be, within the meaning of the same section; and as such were exempt from toll. And on these grounds they dismissed the said information.

The questions for the opinion of the Court were :

1st. Can threshed corn be deemed "fodder for cattle" or "agricultural produce" within the exemption given by stat. 3 G. 4. c. 126. s. 32.?

2nd. Is threshed corn, grown on the farm and transported to be ground into meal, and in its new form returning to the farm to be used as food for cattle exempt from toll both going and returning, or either way?

3rd. Is "fodder for cattle" exempt from toll when in transit, not for consumption or store, but to be submitted to a mechanical process to render it fitter for use as fodder?

And, lastly, whether, on the facts proved as stated above, the justices were right in law in dismissing the said information?

Edmund Round, for the appellant. The justices have put a wrong construction upon sect. 32 of the statute. Neither barley or barley-meal fall within any of the exemptions from toll there enumerated. They are clearly

neither hay, straw, or corn in the straw; nor are they fodder for cattle, the mention of which between "straw" and "corn in the straw" shews that the Legislature had in contemplation fodder ejusdem generis. [*Blackburn J.* Does "fodder" mean that which already is, or that which is intended to be, food for cattle?] It is defined in *Johnson's Dictionary* as "dry food stored up for cattle against winter." [*Blackburn J.* That definition appears too limited. Rye grass cut in the field and brought home for immediate consumption by cattle is fodder. *Cockburn C. J.* So are vetches. *Blackburn J.* Corn in the straw would not be fodder.] In some countries it might be, as in *Lincolnshire*, where horses are often fed with unthreshed oats. At all events, assuming that barley is fodder, barley-meal is not; being a manufactured article. [*Cockburn C. J.* The same might be said of hay or chopped straw.] The exemption must end somewhere. Would a baker, carrying loaves of bread, be exempt on the ground that bread is corn? Or would oilcake be fodder for cattle? [*Hill J.* In *Higginbotham v. Perkins* (a) it was held that these exemptions from toll are to be construed beneficially in favour of agriculture.] The statute now under consideration was not, like some of the earlier Acts, passed for the benefit of agriculture, but simply because, as the preamble recites, "the laws" "in force for the general regulation of turnpike roads" were "found to be ineffectual and" required "amendment." [*Cockburn C. J.* You say that when the barley first passes through the toll gate it is not being carried as food for cattle, but as something to be converted into such food. But when it comes back in the shape of barley-meal, you say that it has passed into

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(a) 8 Taunt. 795.

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a further stage than being produce "which has grown or arisen on land."] In the present case it is found that the barley-meal with which the defendant came back was made from different barley to that with which he first passed through. In sect. 16 of the Act, "hay, straw, fodder or corn unthreshed" are specified, not "fodder for cattle." The Legislature, in passing sect. 32, must have intended the toll-gate keeper to have reasonable means of ascertaining, from ocular inspection, whether the exemptions attached or not upon things passing the gate. [*Blackburn J.* How can the toll keeper tell from inspection upon whose land hay, straw, or corn have grown? He must take the carter's word as to who is the owner and whence they come.] Had the Legislature supposed that fraud would be perpetrated in that respect, they would, as in sect. 27 with reference to empty waggons going for manure, have enacted that the toll should be paid in the first instance, and returned on production of an exemption ticket.

Shaw, for the respondent, was not called upon.

COCKBURN C. J. In this case I think that the justices were right in holding that the exemption from liability to toll did exist. It is true that the application of barley or barley-meal as food for cattle may be a modern practice. But the words of the Act of Parliament are wide enough to include them within the exemption, and the principle of exemption applies. It has been held that clauses of this nature are to be construed liberally, in favour of agriculture. No doubt there is some difficulty, at first sight, in saying that barley in the course of transit to a mill for the purpose of being ground into meal,

to be afterwards eaten by cattle, is already fodder for cattle; but, giving a fair and liberal construction to the words of the statute, I think that everything which is ultimately destined to be used as food for cattle is fodder for them, although it may not have gone through the final process which will make it such. Otherwise, this absurd and inconvenient consequence would follow, that if a man passed through a toll-gate with barley intended, in its natural state, as food for cattle, he would be within the exemption; but if he had a crushing machine on his own premises, to reach which with the barley he had to pass through the gate, he would be liable to toll because of his intention to crush the barley before giving it to his cattle. So, again, it would be strange if a man who was taking turnips to be boiled, before giving them to his cattle, as is done in parts of *Scotland*, was not exempt from toll in respect of them. A variety of similar instances might be adduced. The safer course is to construe the Act liberally, in accordance with the spirit in which such enactments ought to be construed; and to hold that the exemption extends to corn destined for the consumption of cattle, although at the time that the exemption is claimed it is in an intermediate stage towards being made into fodder for them.

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(WIGHTMAN J. was absent.)

HILL and BLACKBURN Js. concurred.

Judgment for the respondent.

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Wednesday,
November 14th.

DOICK, appellant, *against* PHELPS, respondent.

The Watermen's and Lightermen's Amendment Act, 1859, 22 & 23 Vict. c. cxxxiii., by sect. 54 subjects to a penalty "any person, not being a freeman licensed in pursuance of" the "Act, or an apprentice, qualified according to" the "Act, to a freeman or to the widow of a freeman of the" Watermen's Company, who "shall at any time act as a waterman or lighterman, or ply or work or navigate any" "lighter" "upon the" "river" *Thames* "from or to any place or places" "within the limits of" the "Act, for hire or gain."

CASE stated by a Metropolitan police magistrate, under stat. 20 & 21 Vict. c. 43.

On 11th *February*, 1860, the appellant appeared before the magistrate to answer the complaint of the respondent, a freeman of the company of "The Master, Wardens and Commonalty of Watermen and Lightermen of the river *Thames*," for that on 3rd *February*, 1860, upon the river *Thames* between *Teddington Lock*, in the counties of *Middlesex* and *Surrey*, and *Lower Hope Point*, near *Gravesend*, in the county of *Kent*, to wit at the parish of *Putney*, in the county of *Surrey*, the said appellant, not being licensed in pursuance of, or qualified according to, The Watermen's and Lightermen's Amendment Act, 1859 (*a*), did then and there unlawfully act as a lighterman, working and navigating a certain barge upon the said river for hire and gain, contrary to the said statute.

Stat. 7 & 8 G. 4. c. clxxv., which by sect. 37 imposed a similar penalty, and by sect. 101 exempted therefrom persons navigating "western barges," is repealed by stat. 22 & 23 Vict. c. cxxxiii., which by sect. 7 enacts, "that such repeal shall not affect" "any appointment or license duly made or granted under any enactment hereby repealed."

Held, that a person found plying and navigating a barge for hire on the *Thames*, within the limits of stat. 22 & 23 Vict. c. cxxxiii., and not being licensed or qualified according to the Act, incurs a penalty under sect. 54, though the barge started from a place beyond those limits, and would, under stat. 7 & 8 G. 4. c. lxxv., have been deemed a "western barge."

(a) Stat. 22 & 23 Vict. c. cxxxiii. Local and personal, public.

At the hearing the following facts were admitted. That, at the time of committing the alleged offence, the appellant was neither licensed nor qualified as aforesaid, and was acting as a lighterman, working and navigating for hire and gain on the said river *Thames* at *Putney*, within the limits mentioned in the said Act, a barge carrying timber; which barge started from the town of *Guildford*, in the county of *Surrey*, and was worked and navigated as aforesaid by the said appellant, from *Guildford* aforesaid, upon and through the said river *Thames* within the limits aforesaid, to *Northfleet* in the county of *Kent*, below *London Bridge*. That the said barge was, at the time of the committing of the said alleged offence, a flat bottomed barge, and would have been deemed to be a "western barge" within the meaning of the 101st sect. of stat. 7 & 8 G. 4. c. lxxv. (a), intituled "An Act for the better regulation of the watermen and lightermen on the river *Thames*, between *Yantlet Creek* and *Windsor*," if such Act had not been previously repealed. *Guildford* aforesaid is beyond the town of *Kingston*, in the county of *Surrey*, and beyond the limits mentioned in The Watermen's and Lightermen's Amendment Act, 1859, 22 & 23 Vict. c. cxxxiii., that is to say, beyond *Teddington Lock*, in the counties of *Middlesex* and *Surrey*. *Putney Bridge* aforesaid, where the alleged offence was committed, is within the limits defined by the last mentioned Act.

Prior to the passing of stat. 22 & 23 Vict. c. cxxxiii., The Master, Wardens and Commonalty of Watermen and Lightermen of the river *Thames* were used and accustomed to grant a license or permission to all persons who

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had duly served an apprenticeship, and been admitted as freemen of the said Company, and also to the qualified apprentices of such freemen, to work and navigate barges on the river *Thames* for hire: but such licenses were not granted to any other persons. The said appellant had, previously to the commencement of the Act last mentioned, been in the habit of navigating western barges on the river *Thames*, within or through the limits of the said last mentioned Act, for several years, but never was a freeman of the said Company, or an apprentice to a freeman or to the widow of a freeman of the said Company.

By the 3rd section of stat. 7 & 8 G. 4. c. lxxv. the limits of the jurisdiction of the said Company were defined to be from the town of *New Windsor*, in the county of *Berks*, to *Yantlet Creek*, in the county of *Kent*; and by the 104th section of the same Act the owners of laystalls and chalk hoys, and divers other persons therein particularly specified, although not freemen of the said Company, were permitted to work and navigate lighters, hoys, and other vessels or craft, in and upon the said river, without being subject to any of the penalties imposed by such Act. Stat. 22 & 23 Vict. c. cxxxiii. came into operation on 1st *January*, 1860, the object thereof being to make better regulations for the safe navigation and traffic in and upon the said river; and by the 7th section of such last mentioned Act the whole of stat. 7 & 8 G. 4. c. lxxv. was repealed, subject only to the reservation of such rights as are in the said section particularly specified; and the said Act contains divers clauses whereby the limits of the jurisdiction of the said Company are considerably altered and modified, and various privileges and exemptions conferred by the former

Act upon the freemen of the said Company, the owners of western barges, laystalls, chalk hoys and other vessels and craft, were wholly abolished, and a new system of supervision and control over the traffic of the said river was substituted in lieu of that which formerly prevailed.

When the alleged offence was committed, the said stat. 22 & 23 *Vict. c. cxxxiii.* was in force.

It was contended, on behalf of the appellant, that he, the said appellant, was not liable to be convicted on the said information, as the barge he was working and navigating was a western barge as aforesaid; and as his barge, at the time of the said alleged offence, was being navigated as aforesaid from a place beyond the limits of the said Act.

It was contended, on behalf of the respondent, that the said appellant was liable to be convicted, as the previous exemption in favour of western barges was repealed by the said Act; and that his said barge, at the time of the alleged offence, was being navigated by him as before, and within the limits of the said Act.

Stat. 22 & 23 *Vict. c. cxxxiii.* and so much of stat. 7 & 8 *G. 4. c. lxxv.* as was relevant to the question at issue, were to be considered as part of the case.

The magistrate, upon the said hearing, overruled the said objections so taken on behalf of the said appellant as aforesaid, and decided and adjudged that the said appellant was guilty of the said offence, upon the ground that stat. 22 & 23 *Vict. c. cxxxiii.* abolished the exemption in favour of western barges referred to in the 101st section of stat. 7 & 8 *G. 4. c. lxxv.*, and also the exemption in favour of laystalls and chalk hoys and other vessels referred to in the 104th section of the same Act; notwithstanding sect. 7 of stat. 22 & 23 *Vict.*

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c. cxxxiii.; and that the above Act applied to a barge starting from a place beyond the limits of the Act, as *Guildford* aforesaid, and having been navigated from such place to a place within its limits, as *Putney* aforesaid; and also upon the ground that the appellant had acted as a lighterman within the said limits, contrary to the provisions of the said Act. And the magistrate then adjudged the appellant to pay for his said offence the sum of 6*d.*, and 2*s.* for costs.

The question for the opinion of the Court was, whether this decision was correct. If the Court should be of opinion that it was, the conviction was to be affirmed; but if the Court should be of a contrary opinion, then the conviction was to be quashed.

Scotland, for the respondent. The appellant was rightly convicted. It was admitted at the hearing that he was neither licensed in pursuance of, or qualified according to, The Watermen's and Lightermen's Amendment Act, 1859, 22 & 23 *Vict. c. cxxxiii.*: sect 54 of which enacts that "If any person, not being a freeman licensed in pursuance of this Act, or an apprentice, qualified according to this Act, to a freeman or to the widow of a freeman of the said Company" "shall at any time act as a waterman or lighterman, or ply or work or navigate any wherry, passenger boat, lighter, vessel, or other craft upon the said river, from or to any place or places" "within the limits of this Act, for hire or gain," he shall be subject to a penalty for every such offence not exceeding 40*s.* The places within the limits of the Act are, by sect. 8, declared to be "all parts of the river *Thames* from and opposite to and including *Teddington Lock* in the counties of *Middlesex* and *Surrey*,

to and opposite to and including *Lower Hope Point* near *Gravesend* in the county of *Kent*." The case finds that the appellant worked and navigated a barge, for hire and gain, at *Putney*, within these limits. That being so, he clearly committed the offence prohibited by sect. 54, and the fact that the barge started on its voyage from *Guildford*, a place beyond the limits of the Act, constitutes no defence. A main object of the Act, as the Preamble recites, was, "that proper regulations should be made for the navigation of barges, lighters, boats, and other like craft carrying goods, wares, and merchandise within the limits of" the "Act, and for the regulation of the persons employed to navigate the same, and for the security of passengers passing to and fro on the said river in boats and other craft, and for the orderly conduct of the traffic on the said river." This object would be in great measure frustrated, if unqualified persons can elude the provisions of the Act by starting from points a little higher up the river than *Teddington Lock*. In *Reed v. Ingham (a)* it was held, upon the construction of the corresponding section (the 37th) in the repealed Act, 7 & 8 G. 4. c. lxxv., that a steam-tug was not a "wherry, lighter, or other craft," and therefore that a person navigating her within the prescribed limits was not liable to the penalty. The decision is not in point here; but the observations of *Erle J.*, to the effect that the watermen's privilege was given them for the public good, on the presumption that they would go through the proper means of qualifying for the duties which they would have to perform, illustrate the inten-

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(a) 3 E. & B. 889.

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tion of the Legislature. [*Cockburn* C. J. You need not argue this point further. It would be putting a most absurd construction upon the Act to hold that the statutory prohibition upon the navigation of lighters by unqualified persons within the prescribed limits does not operate if the lighter starts from *Hampton Court* instead of *Teddington*; the necessity for a competent qualification in the person navigating being the same in both cases.] That is the only reasonable interpretation of the statute. *Walker v. Evans* (a) is a direct authority in favour of it. It was there held that a steam-tug which occasionally plied to and fro between *London Bridge* and places to the eastward of the *Nore Light* was, while employed on any portion of the river between *London Bridge* and the *Nore Light*, subject to the penalties for not consuming its own smoke, imposed by stat. 19 & 20 *Vict. c. 107. s. 1.* on "all steam vessels plying to and fro between *London Bridge* and any place on the river *Thames* to the westward of the *Nore Light*." The only remaining point is, whether the fact found in the case that the appellant's barge would have been deemed a "western barge" under sect. 101 of the repealed Act, 7 & 8 *G. 4. c. lxxv.*, exempts him from liability to conviction. It is thereby enacted "That nothing in" that "Act contained," with some immaterial exceptions, "shall extend to any western barges; and that all flat bottomed boats and barges navigated from the town of *Kingston* in the county of *Surrey*, or any place or places beyond the said town, shall be deemed western barges, and shall and may be navigated on the said river of (b) *Thames* as far as *London Bridge*;"

(a) 2 *E. & E.* 356.(b) *Sic.*

“and no person or persons navigating such western barges” “shall in respect thereof be subject or liable to any penalties or forfeitures imposed by this Act.” The appellant will contend that this exemption in favour of western barges is preserved by sect. 7 of stat. 22 & 23 *Vict. c. cxxxiii*. That section, however, so far as it is material, merely enacts that the repeal of stat. 7 & 8 *G. 4. c. lxxv*. “shall not affect” “any appointment or license duly made or granted under any enactment hereby repealed.” And it is manifest that the exemption of a western barge from penalties was neither an appointment or a license under any repealed Act. The licenses and appointments referred to were licenses and appointments granted by the Watermen’s Company under the powers of the former Act. The recent Act contains numerous express exceptions from its operation, and had the Legislature intended to continue the exemption of western barges, they would have said so.

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Bovill, *contra*. As to the first point; the construction of the Act contended for by the other side will exclude men who have been navigating barges on the river all their lives from continuing to do so within the prescribed limits, although mere apprentices of two years’ standing are supposed competent for the task. *Reed v. Ingham* (a) has no further application to the present case than that it shews that these Acts, like penal enactments, are to be construed strictly. As to the second point, the Legislature, by sect. 7 of the recent Act, intended to save all existing rights and exemptions, although they might, no doubt, have used apter words for that purpose. [*Cockburn C. J.* The question really narrows itself to this: is the exemption in favour of western barges

(a) 3 *E. & B.* 889.

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contained in stat. 7 & 8 G. 4. c. lxxv. an "appointment or license duly made or granted" under that Act, within the meaning of stat. 22 & 23 Vict. c. cxxxiii. ? And how can it be either the one or the other ? *Hill J.* It is scarcely conceivable that the Legislature would not have re-enacted the provisions of the old Act in favour of western barges, had they intended to preserve them. *Cockburn C. J.* Stat. 7 & 8 G. 4. c. lxxv. s. 37. corresponds exactly with stat. 22 & 23 Vict. c. cxxxiii. s. 54. And the express exemption of persons navigating western barges from liability to conviction is found only in the former Act.] That being the opinion of the Court, the point will not be further pressed. There is, however, a further point; namely, that sect. 54 does not impose an absolute prohibition upon the navigation of a barge by an unlicensed person within the limits of the Act. This appears from sect. 66, which, after prohibiting the navigation of any barge, lighter, boat and other craft, within the limits, unless in charge of a licensed lighterman or qualified apprentice, under a penalty upon the owner not exceeding 5*l.*, provides "that no such penalty shall be payable if the owner proves, to the satisfaction of the magistrate or Court before whom the case is heard, that he is unable, for the usual compensation, to obtain the services of any such lighterman or apprentice." Ability to obtain those services, and failure, notwithstanding, to obtain them, is therefore an implied ingredient in the offence created by sect. 54, and it is consistent with the facts stated in the case that this ingredient was wanting in the alleged offence imputed to the appellant. [*Hill J.* Sect. 66 does not apply to the navigation of a barge for hire or gain, by an unqualified person, which is the offence prohibited by sect. 54.]

COCKBURN C. J. This conviction was clearly right.
If there is any hardship in the present state of the law,
the Legislature alone can interfere.

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(WIGHTMAN J. was absent.)

HILL and BLACKBURN Js. concurred.

Conviction affirmed.

Ex parte BARTLETT.

Thursday,
November 15th.

KINGLAKE Serjt. moved, on behalf of *John Bartlett*, for a rule calling on three justices of *Somersetshire* to shew cause why they should not make an order, under stat. 5 & 6 W. 4. c. 50. s. 95., directing that an indictment should be preferred against the inhabitants of *East Coker* for the non-repair of a certain highway.

Stat. 5 & 6
W. 4. c. 50.
s. 95. enacts,
"that if on
the hearing
of" a "sum-
mons respect-
ing the repair
of any high-
way the duty
or obligation
of such repairs
is denied by
the surveyor"
of the parish
alleged to be
chargeable
with the re-
pairs "on
behalf of the
inhabitants of
the parish,"
"it shall then
be lawful for"
the "justices"
in special ses-
sions for the
highways.
before whom

It appeared from the applicant's affidavit that, on 29th August, 1860, he laid an information before a justice of the county, alleging that a highway called *Isles Lane*, in the parish of *East Coker*, in the said county, extending from its connection with the public highway from *East Coker* to *Pendomer* to the point which connects it with the highway from *East Coker* to *Sutton Bingham*, was out of repair, and that the parish of *East Coker* was chargeable with the repair; that thereupon the justice

the summons is heard, "and they are hereby required, to direct a bill of indictment to be preferred" "at the next assizes" "against the inhabitants of the parish" "for suffering and permitting the said highway to be out of repair."

Held, that, although where the road alleged to be out of repair is admitted at the hearing to be a highway and to need repair, and only the liability to repair is disputed by the parish, this section renders it imperative on the justices to order an indictment to be preferred, they have no jurisdiction to make such an order, if it appears that the parish has already been acquitted on a similar indictment.

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issued a summons to the surveyor of the said parish, to appear before the justices at the next special highway Sessions for that division of the county, to be holden on 5th September, 1860; that at those Sessions the surveyor appeared before the three justices called upon by the proposed rule, and, on behalf of the parish denied the duty or obligation to repair, on the ground that a previous indictment against the inhabitants of the parish, for the non-repair of the same highway, had been preferred by order of justices, under stat. 5 & 6 W. 4. c. 50. s. 95., and a verdict of acquittal had been returned thereon, at the last *Lent* Assizes for the county. That thereupon the applicant applied to the justices to order, under the 95th section of the said Act, an indictment to be preferred against the parish; which they refused to do. The affidavit further stated that, at the trial of the indictment at the *Lent* Assizes, conclusive evidence was given of user of the lane by the public, as a highway, for the last fifty years and upwards, and that a large portion of such highway had been from time to time repaired by the parish of *East Coker*; and that, among other grounds of defence, the defendants then contended that a portion of the highway was not within their parish; and the jury, after being locked up nearly five hours, gave a verdict of acquittal, which was against the evidence and the summing up of the presiding Judge. There were also affidavits of aged persons, as to the user of the lane for many years as a highway: and that a great portion of it had been confessedly repaired by the parish of *East Coker*, with hard materials, for a number of years.

Kinglake Serjt., for his rule. The justices were bound to order the indictment to be preferred. Stat. 5 & 6 W. 4.

c. 50. s. 95. enacts "That if on the hearing of any" "summons respecting the repair of any highway the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish," "it shall then be lawful for such justices and they are hereby required to direct a bill of indictment to be preferred" "at the next Assizes" "against the inhabitants of the parish" "for suffering and permitting the said highway to be out of repair." This enactment is imperative, and leaves the justices no discretion; *Regina v. Arnould* (a). [Hill J. There is this distinction between that case and the present, that, here, the road has been found by the verdict of a jury not to be a highway repairable by the parish. I think that the justices are justified in declining to make an order if they have proof before them that the parish is not liable.] The verdict was a general one of Not guilty: but, if it is an answer to a fresh indictment, it may be given in evidence at the trial. [Blackburn J. It appears from *Regina v. Heanor* (b), that an indictment ought not to be preferred against the parish, unless the road is a highway.]

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COCKBURN C. J. I am of opinion that there should be no rule. This is an application to us for our summary interposition, the exercise of which is discretionary, and ought not, I think, to be put in force in the present case. It is clear that stat. 5 & 6 W. 4. c. 50. s. 95. requires the justices to direct an indictment to be preferred, only where the liability to repair the road is disputed and it has not been already determined by verdict that the road is not a highway. It is evident

(a) 8 E. & B. 550.

(b) 6 Q. B. 745.

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that, if this rule were granted, parishes might be perpetually harassed by fresh indictments for the non-repair of roads, their liability to repair which had already been negatived by the verdict of a jury. That would encourage a vexatious course of proceeding. Our refusal to grant this application does not, on the other hand, preclude the applicant from preferring an indictment against the parish at common law.

(WIGHTMAN J. was absent.)

HILL J. I am of the same opinion. Sects. 94 and 95 of stat. 5 & 6 W. 4. c. 50. apply only to the case of an admitted highway. In order to found the jurisdiction of the justices to make the order for an indictment the road must be a highway, and it must be out of repair; which latter fact the justices are to ascertain either in person or by a surveyor. Then comes the question of the liability to repair. If that only is disputed, and the facts are admitted, the justices are to order an indictment to be preferred, but not otherwise.

BLACKBURN J. Sect. 95 assumes that there is a highway, and that it is out of repair. These two facts are conditions precedent to the justices acting in the matter. When these facts have been established, and not before, the justices have no discretion to refuse to direct an indictment to be preferred against those by whom the liability to repair is denied.

Rule refused.

1860.

HILL, appellant, *against* **THORNCROFT**, respondent. *Saturday, November 17th.*

CASE stated under stat. 20 & 21 *Vict. c. 43.*

At a Petty Sessions of the justices for *Brighton*, held on 15th *December*, 1859, an information came on for hearing which had, on 5th *December*, 1859, been laid by *Samuel Thorncroft*, the respondent, assistant overseer of the poor of the parish of *Brighton*, charging that the churchwardens and overseers of the poor of the parish of *Cullompton*, in the county of *Devon*, and *Henry Hill*,

Stat. 4 & 5 W. 4. c. 76. s. 84. enacts, "That the parish to which any poor person whose settlement shall be in question at the time of granting relief shall be admitted or finally adjudged to

belong shall be chargeable with and liable to pay the cost" "of the" "maintenance of such poor person, and such cost" "may be recovered against such parish in the same manner as any penalties or forfeitures are by this Act recoverable:" provided that such parish shall pay to the relieving parish such cost from such time only as notice that the poor person has become chargeable shall have been sent by the relieving parish to the parish of settlement. By sect. 79 no poor person is to be removed, under an order of removal, until twenty-one days after written notice of his being chargeable has been sent by the relieving parish to the parish of settlement, have elapsed without an appeal by the latter parish against the order of removal. By sect. 99, penalties and forfeitures under the Act are made recoverable by information before justices and their order thereon, no time being limited for laying the information.

Stat. 11 & 12 Vict. c. 43. s. 11. enacts, "That in all cases where no time is" "specially limited for" "laying any" "information in the Act" "of Parliament relating to each particular case," "such information shall be laid within six calendar months from the time when the matter of such" "information" "arose." By sect. 35, "Nothing in this Act shall extend or be construed to extend to any warrant or order for the removal of any poor person who" "shall become chargeable to any parish."

An order having been made for the removal of a female pauper, written notice of her chargeability was sent by the relieving parish to the parish of settlement, which did not appeal against the order of removal. At the date of the order the pauper was pregnant, though not unable to bear removal. She so continued for some months, and was not actually removed till after her delivery, and five months after the service of the notice of chargeability. Nearly six years after her removal, the relieving parish laid an information before justices against the parish of settlement, for the cost of her maintenance from the time of the service of the notice of chargeability to that of her actual removal: and the justices made an order for the full amount.

On appeal by the parish of settlement against this order: held, First, that the relieving parish was entitled, under stat. 4 & 5 *W. 4. c. 76. ss. 79. 84 and 99*, to the cost of the pauper's maintenance only for the twenty-one days next after the service of the notice of chargeability. Secondly, that the information on which the order was founded was laid too late, by reason of stat. 11 & 12 *Vict. c. 43. s. 11.*; and was not within the exemption in sect. 35.

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the appellant, assistant overseer of the poor of the same parish, being the parish to which one *Elizabeth Hill* and her illegitimate child, *James Hill*, poor persons, had been adjudged to belong, had refused and still did refuse to pay to the directors and guardians and the assistant overseer of the poor of the parish of *Brighton* aforesaid, the sum of 10*l.* 12*s.* 3*d.*, being the cost and expense of the relief and maintenance of such poor persons under an order of two justices of the peace for the county of *Sussex*, dated 6th *October*, 1853, for the removal of the said *Elizabeth Hill* and her said child from the said parish of *Brighton* to the said parish of *Cullompton*, from the time that notice of such order and of the said poor persons having become chargeable to the said parish of *Brighton* had been sent by such parish to the said parish of *Cullompton*.

The facts of the case proved before the justices were as follows.

On 6th *October*, 1853, an order for the removal of *Elizabeth Hill* and her illegitimate child, *James Hill*, from the parish of *Brighton* to the parish of *Cullompton*, was duly made by two justices for the county of *Sussex*. On 14th *October*, 1853, a copy of the said order of removal, with notice of chargeability and grounds of removal, was duly sent by post by the directors and guardians of the poor of the parish of *Brighton* to the overseers of the parish of *Cullompton*. *Elizabeth Hill* was, at the time of the said order being made, maintained in the workhouse of *Brighton*. She was pregnant at that time, and was delivered at the said workhouse on 3rd *January*, 1854. By reason of such pregnancy and delivery, and the delicate state of her health consequent thereupon, she could not be removed under the

said order till 9th *March*, 1854. During all that time she continued an inmate of the workhouse of *Brighton*, and during such time her said child, *James Hill*, died. On 9th *March*, 1854, the said order was executed by the delivery of the said *Elizabeth Hill* and the infant to which she had given birth after the making of the said order, with a duplicate of the said order and a statement of charges for maintenance, to the assistant overseer of *Cullompton* at *Cullompton*; and the sum of 10*l.* 12*s.* 3*d.* was then demanded of the said assistant overseer of *Cullompton* as due to the parish of *Brighton* for the maintenance of the said paupers, but was not then paid and has not since been paid. The said sum of 10*l.* 12*s.* 3*d.* had been expended by the parish of *Brighton*, for the maintenance of the said *Elizabeth Hill* and her said child *James Hill* and her said infant, from the time when the copy of the said order of removal and the notice of chargeability and grounds of removal were sent to the overseers of *Cullompton*, to the time of the said *Elizabeth Hill* and infant being removed under the said order; and the sum of 3*l.* 14*s.* 11*d.*, part of such sum of 10*l.* 12*s.* 3*d.*, was expended more than six years before the information was laid.

It was objected on behalf of the defendants; First, that the information ought to have been laid within six months from the time of the said sum of 10*l.* 12*s.* 3*d.* being demanded, as required by stat. 11 & 12 *Vict.* c. 43. s. 11., and that this was not a proceeding excepted from the operation of that Act by the 35th section thereof. Secondly, that the order ought to have been suspended, and notice of such suspension sent to the overseers of *Cullompton*. Thirdly, that the moneys

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expended more than six years before the information was laid, were irrecoverable, by reason of the Statute of Limitations.

The justices decided against the defendants, and made an order for the payment of the 10*l.* 12*s.* 3*d.*, and the costs incurred before them. The grounds of their decision were that they considered this proceeding was, by the 35th section of stat. 11 & 12 *Vict. c.* 43., excepted from the operation of that statute; that *Elizabeth Hill* was not at the time of making the order unable to travel from any cause other than her pregnancy, which did not afford legal ground for the suspension of the order; and that the Statute of Limitations was no bar to the recovery of the moneys expended more than six years previously to the information being laid as directed by stat. 4 & 5 *W. 4. c.* 76. s. 84. (a).

Tomlinson, for the appellant (b). It is not now contended, for the appellant, that the Statute of Limitations was a bar to the information. The first and material question is whether the information was not too late, considering the years which had elapsed since the order of removal was made. That it was so is shewn by state-

(a) No question was stated for the opinion of the Court.

(b) *Wednesday, November 14th.* According to the practice of the Court, counsel in support of the information would have begun. The respondent, however, had made default in delivering to the Judges copies of the case stated. The appellant had, consequently, delivered them for him; but as they had neither been paid for, nor had any deposits been made with the Master in pursuance of the 16th practice rule of *Hilary Term, 1858* (made applicable by order of the Judges of *Michaelmas Term, 1857*, to cases stated under stat. 20 & 21 *Vict. c.* 43.), the Court could not now hear counsel for the respondent; but arranged to do so on the next Crown paper day, on the respondent complying with the rule in the interim.

11 & 12 Vict. c. 43. s. 11., which enacts "That in all cases where no time is already or shall hereafter be specially limited for making any" "complaint or laying any" "information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." That section applies to the information in the present case. The respondent will contend that it does not, by reason of sect. 35, which enacts "That nothing in this Act shall extend or be construed to extend to any warrant or order for the removal of any poor person who is or shall become chargeable to any parish, township, or place;" but the operation of that clause is limited to the warrant or order for removal itself, and does not extend to a subsequent independent order for the payment of expenses of maintenance. This is shewn clearly by the language of the following clause of the section, which, as regards lunatics, does in terms exempt from the operation of the Act "complaints or orders made with respect" not only to them but to "the expenses incurred for the lodging, maintenance, medicine, clothing or care of" them. The information, therefore, was required, by sect. 11, to be laid within six months from the time when the matter of the information arose. The reason for the distinction made by the Legislature between the cases of common paupers and lunatic paupers is that, before stat. 11 & 12 Vict. c. 43., the expenses of the maintenance of the former were recoverable under stat. 4 & 5 W. 4. c. 76. s. 99., by which no time was limited for the recovery: whereas those of the maintenance of the latter were, by stat. 8 & 9 Vict.

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c. 126. *ss.* 62, 63, 64, recoverable only in respect of the twelve calendar months before the date of an order. The same remark applies to orders in bastardy made against putative fathers; which are also, by stat. 11 & 12 *Vict. c.* 43. *s.* 35., exempted from the operation of that Act, they being already provided for by stat. 7 & 8 *Vict. c.* 101. *ss.* 2—5. There would be manifest injustice in holding, as the respondent asks the Court to do, the inhabitants of a parish to be liable to pay the expenses of the relief of a pauper nearly six years before; for great part of the inhabitants must have changed in the interval. Secondly, the order of removal ought to have been suspended. The facts material to this point are stated very obscurely in the case. Admitting, however, that the pauper's pregnancy, alone, would not have amounted to sickness rendering her unable to travel, it appears from the case that she was also in a delicate state of health, and that, as a matter of fact, she could not be removed during all the time from 6th *October*, 1853, to 9th *March*, 1854. From these statements the inference fairly arises that she was so ill that it would have been dangerous for her to travel. If so, stat. 35 *G. 3. c.* 101. *s.* 2. applies; which, after reciting that poor persons are often removed or passed to the place of their settlement during the time of their sickness, to the great danger of their lives, enacts "That in case any poor person shall from henceforth be brought before any" "justices" "for the purpose of being removed from the place where he or she is inhabiting or sojourning, by virtue of any order of removal," "and it shall appear to the said" "justices that such poor person is unable to travel, by reason of sickness or other infirmity, or that it would be dangerous for him or her so to do, the" "justices making such

order of removal" "are hereby required and authorised to suspend the execution of the same until they are satisfied that it may safely be executed without danger to any person who is the subject thereof: which suspension of, and subsequent permission to execute the same, shall be respectively indorsed on the said order of removal" "and signed by such" "justices." [*Cockburn C. J.* What is there in the case, as stated, to shew us that when the application for the order of removal was made it appeared to the justices that the pauper was unable to travel? It is consistent with the facts stated that the sickness, if any, which disabled her from travelling, supervened after the making of that order.] The case seems to find that the inability to travel existed when the order was made. If it did, the order of removal ought to have been suspended; and notice thereof given by the respondent to the appellant, under stat. 4 & 5 W. 4. c. 76. s. 84., which enacts "That no charges or expenses of relief or maintenance shall be recoverable under a suspended order of removal unless notice of such order of removal, with a copy of the same, and of the examination upon which such order was made, shall have been given within ten days of such order being made to the overseers of the poor of the parish to whom such order is directed." That enactment, however, it is admitted, is not a bar to the recovery of the costs and expenses for which the order was made in the present case: the information for them having been founded on the original order of removal.

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G. Denman was now heard for the respondent (*a*).

(*a*) See note (*b*), p. 260.

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To begin with the second point. The case does not fall within stat. 35 *G.* 3. c. 101. s. 2.; for the justices have not found as a fact that it appeared to the justices who made the order of removal that the pauper was then unable to travel, by reason of sickness. All that is found is, that she was then pregnant; but pregnancy, per se, does not amount to sickness; *Regina v. Huddersfield* (a). And the statute does not provide for the suspension of an order of removal upon a sickness supervening after it is made: the order can be suspended only at the time it is made; *Regina v. Llanllechid* (b). The order for the payment of the expenses of the pauper's maintenance was rightly made by the justices under the first clause of stat. 4 & 5 *W.* 4. c. 76. s. 84., which enacts "That the parish to which any poor person whose settlement shall be in question at the time of granting relief shall be admitted or finally adjudged to belong shall be chargeable with and liable to pay the cost and expense of the relief and maintenance of such poor person, and such cost and expense may be recovered against such parish in the same manner as any penalties or forfeitures are by this Act recoverable: Provided always that such parish, if not the parish granting such relief, shall pay to the parish by which such relief shall be granted the cost and expense of such relief and maintenance from such time only as notice of such poor person having become chargeable shall have been sent by such relieving parish to the parish to which such poor person shall be so admitted or finally adjudged to belong." Under this section the appellant's parish was clearly liable to the expenses of the pauper's maintenance from

(a) 7 *E.* & *B.* 794.

(b) 2 *E.* & *E.* 530.

14th October, 1853, on which day notice of her having become chargeable was sent to the overseers by post; a mode of service expressly sanctioned by sect. 79. [*Hill J.* Sect. 84 must be construed as giving to the relieving parish the costs of the pauper's maintenance for such period only as the settlement shall be in question. By sect. 79 that period may be either twenty-one days after the receipt by the parish of settlement of notice of the pauper's chargeability and of the order of removal; or a period shorter or longer according as the parish of settlement, before the twenty-one days expire, submits to or gives notice of appeal against the order. In the present case, the period was the twenty-one days. How, then, can the respondent be entitled to an order for expenses accrued since they expired?] Sect. 84 puts no limit upon the amount of expenses recoverable. It cannot have been intended that, in every case like the present, the relieving parish should remove the pauper within the twenty-one days, no matter what the state of the pauper's health may be, on pain of having to be at the cost of his maintenance during the time of any further delay. [*Cockburn C. J.* If your argument is well founded, the relieving parish might keep the pauper for twenty years and charge the parish of settlement with the expense.] Such an abuse would not be warranted by the Act. Stat. 4 & 5 W. 4. c. 76. s. 84. is an enactment independent of stat. 35 G. 3. c. 101. s. 2.; *In re The Overseers of Chedgrave* (a). The later statute provides a remedy cumulative upon that given by the earlier; and was intended to meet the case where the pauper's sickness supervenes after the order of removal, though

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(a) 20 L. J. N. S. M. C. 23.

1860. not apparent at the time the order is made. [*Cockburn*
 HILL C. J. Sect. 84 of stat. 4 & 5 W. 4. c. 76. must be read
 THORNCROFT. in connection with the previous sections, beginning with
 sect. 79; and, so read, must receive the construction
 which my brother *Hill* has pointed out.] At all events,
 even if the Court adopt that construction, the respon-
 dent was entitled to an order for the costs of the pauper's
 maintenance for the twenty-one days next after the
 notice of chargeability was sent; unless the information
 was too late, by reason of stat. 11 & 12 Vict. c. 43. s. 11.
 But, lastly, the justices were right in holding that that
 section did not apply to the case; seeing that sect. 35
 exempts from the operation of the Act any warrant or
 order for the removal of a pauper. The costs of the
 relief and maintenance of a pauper, pending removal,
 are closely connected with and incident to the order
 of removal. [*Hill* J. Sect. 35 is silent about matters
 connected with or incident to an order of removal.
 The words "order of removal" are sufficient to include
 all such matters. The "complaints upon which" "justi-
 ces" "may make an order for the payment of money"
 mentioned in sect. 8, cannot have been meant to include
 complaints founded upon an order of removal; other-
 wise sect. 35 would be practically reduced to a nullity.
 [*Hill* J. By stat. 4 & 5 W. 4. c. 76. s. 84. the cost and
 expense of the pauper's relief and maintenance are made
 recoverable "in the same manner as any penalties or
 forfeitures are by this Act recoverable;" that is, by sect.
 99, by an order of justices made on a distinct informa-
 tion, and enforceable by distress.]

Tomlinson, in reply, was stopped.

COCKBURN C. J. As to the first question, it appears to me that stat. 4 & 5 W. 4. c. 76. s. 84. does not entitle the parish of *Brighton* to any further costs of the pauper's maintenance beyond those incurred during the twenty-one days next following the notice of chargeability given to the parish of *Collumpton*. It appears clear that this section was intended to apply, only, to the expenses incurred by the relieving parish during the period given by previous sections to the parish of settlement, in which to consider whether to submit to or appeal against the order of removal. Sect. 79 having provided that a pauper should not be removable, in a case where no appeal was brought, until twenty-one days after the receipt by the parish of settlement of the notice of chargeability; or, if an appeal was brought, until the appeal was finally determined; sect. 84 fixes the parish of settlement with the costs of the pauper's relief and maintenance during this suspension of removal. But that section appears to make no provision for a case in which, sickness of the pauper supervening after the making of the order of removal, it becomes dangerous or unadvisable to remove him at the expiration of the twenty-one days. Upon the authorities it is clear that an order of removal can be suspended only at the time it is made, and if the justices who make it are at that time satisfied that the pauper is then in an unfit state for removal. The omission by the Legislature to give the justices a like power in the event of sickness, causing inability to bear removal, afterwards supervening, may very possibly form good ground for a remedial Act of Parliament; but cannot be cured by us. The parish of *Brighton* would therefore be entitled to no more than the twenty-one days' expenses. These they might have

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1860. recovered but for the difficulty presented by stat. 11 &
HILL 12 *Vict. c. 43. s. 11.*; and this brings me to the second
V. point in the case. That section imposes six calendar
THORNCROFT. months from the time when the matter of a complaint or
information arises, as the period of limitation within which
a complaint or information, not theretofore restricted as to
time, must be made. It is admitted that the information
in the present case fell within the operation of this enact-
ment unless it is exempted therefrom by sect. 35 of the
same statute; and I think that it is not so. Sect. 35 is in
terms limited to "any warrant or order for the removal
of any poor person." In the case before us, the order
of justices is neither a warrant nor an order for removal,
but simply an order for the payment of costs and
expenses consequent upon an order of removal; nor
does it fairly come within what may be supposed to have
been the intention of the Legislature in enacting the
exemption in question. There was good reason for not
restricting unduly the time for removing a pauper; but
the question of costs stands on a very different footing.
A parish is a fluctuating community; and it would
have been highly inexpedient, not to say unjust, to
saddle one set of inhabitants with costs chargeable upon
their predecessors. Apart, however, from considerations
of that nature, suffice it to say that the order before us
is not a "warrant or order for the removal of any poor
person" within the meaning of stat. 11 & 12 *Vict.*
c. 43. s. 35. The argument for the respondent fails,
therefore, upon both grounds.

(WIGHTMAN J. was absent.)

HILL J. I am of the same opinion. This was an

application to justices by *Brighton* against *Collumpton*, for an order for the costs of the maintenance of a pauper removed from the former to the latter. The information was laid under stat. 4 & 5 *W.* 4. c. 76. s. 84., and the whole amount of the costs incurred in the pauper's maintenance, from 14th *October*, 1853, the date on which the notice of chargeability was served on *Collumpton*, to 9th *March*, 1854, the date of her actual removal, were claimed as recoverable. In order to ascertain how far stat. 11 & 12 *Vict.* c. 43. s. 11. affects the right of *Brighton* to recover these costs, it is important to consider the provisions of the statute of *W.* 4. Sect. 84 of that Act enacts that the costs in question shall be recoverable "in the same manner as any penalties or forfeitures are by this Act recoverable;" that is, as appears from sect. 99, by order of justices made on a distinct information in that behalf. The costs are therefore recoverable by proceedings consequent upon, not under, the original order of removal. But stat. 11 & 12 *Vict.* c. 43. s. 11. expressly enacts that in all cases (and the present is one) where no time is specially limited for laying an information in the Act relating to the particular case, "such information shall be laid within six calendar months from the time when the matter of such" "information" "arose." The present information not having been laid till upwards of six calendar months after the matter of it arose, was clearly, therefore, too late, unless it falls within the exemption created by sect. 35 in favour of "any warrant or order for the removal of any poor person." But, as I have already said, this information forms no part of the warrant or order for removal, but is a step subsequent to and wholly distinct from it. I may also observe that sect. 35 is satisfied by

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supposing it to enact merely that none of the forms given in the schedule to the Act, and which, by sect. 32, are to be deemed good, valid and sufficient in law, shall be applicable to a warrant or order of removal. It does not exempt from the operation of the Act an information of the present description, any more than any other proceeding. I think, therefore, that the limitation clause clearly applies, and that the justices had no jurisdiction to make any order at all. Upon the other point, I entirely concur in all that the Lord Chief Justice has said, and agree with him that, if the limitation clause had not applied, no further costs of the pauper's maintenance could have been recovered by the relieving parish than those incurred during the twenty-one days next following the service by them of the notice of chargeability.

BLACKBURN J. I am of the same opinion on both points. Stat. 11 & 12 *Vict. c. 43.* applies generally to all proceedings by way of information or complaint before justices. Sect. 35 exempts certain matters from the operation of these general provisions, orders of removal amongst them: but this exemption evidently applies to such orders themselves, only, not to proceedings taken in consequence of them. Now an order for the costs of the maintenance of a pauper, made consequently to an order of removal, is no part of the order of removal. Stat. 4 & 5 *W. 4. c. 76. s. 84.*, taken in conjunction with sect. 99, enacts that these costs shall be recoverable by a distinct and independent information and order of justices made thereupon. No limitation of time being fixed by that Act, for laying the information, the case clearly falls within the very words of stat. 11 & 12 *Vict. c. 43. s. 11.*, and is not within the benefit

of sect. 35. And, independently of the provisions of the later statute, it seems only reasonable that a parish should not be liable to have such claims raked up against it at any distance of time. Upon the other point, I entirely agree with the opinion of the Lord Chief Justice, and with the reasons which he has given for it.

Order quashed, without costs.

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The QUEEN against BODKIN and others, Justices of MIDDLESEX.

Monday,
November 19th.

HONYMAN had obtained a rule, calling upon three of the justices of *Middlesex* and *Thomas Beall* to shew cause why the said justices should not issue their warrant to levy by distress and sale of the goods of the said *Thomas Beall* the sum assessed upon him in respect of a house and premises owned and occupied by him in or near *Maynard Street*, in the parish of *Hornsey*, in the said county, by the Local Authority in the said parish for executing The Nuisances Removal Act for *England*,

By The Nuisances Removal Act for *England*, 1855, 18 & 19 *Vict. c. 121. s. 22.*, whenever any drain used for the conveyance of sewage from any house, buildings, or premises, is a nuisance, and cannot, in the opinion of the Local Authority,

be rendered innocuous without the laying down of a sewer, the Local Authority are empowered and required to lay down such sewer; and are authorized and empowered to assess every house, building, or premises using the same, to such payment as they shall think just and reasonable.

Under this Act the parish of *H.* was, in the first instance, divided into four districts. The Local Authority, in 1855, constructed a sewer in one of these, in order to render a nuisance there innocuous; *B.*'s house, situated there, was assessed to the expense of the construction; and *B.* paid an agreed composition on the assessment. In 1856 the Local Authority constructed another sewer in a second district, in order to render a nuisance in that district innocuous. These two sewers brought down the sewage from the two districts into a third, in such quantities as to greatly increase a pre-existing nuisance there: in order to render which innocuous, the Local Authority, in 1859, constructed a further sewer, running through the third and fourth districts, and, upon its completion, resolved that the drainage of all four districts should form one system, the total costs of different works be ascertained, and the houses &c., through all four districts, using the sewer, be equally assessed towards the expenses incurred.

Held that *B.*'s house, above mentioned, was liable to be re-assessed to such expenses as a house "using" the whole sewerage system, within the meaning of sect. 22.

1860. 1855, by an assessment, dated 19th *December*, 1859,
 The QUEEN upon all houses, buildings and premises in the village of
 V. *Hornsey* and *Crouch End*, in the said county, using, for
 BODKIN. the purposes mentioned in the said Act, the sewers,
 drains, &c., constructed by the said Local Authority.

It appeared from the affidavits on which the rule was obtained that, for the purposes of drainage under The Nuisances Removal Act for *England*, 1855, the parish of *Hornsey* had been divided into four districts: *Hornsey Village* District, *Muswell Hill* District, *Crouch End* District and *Maynard Street* District; in the last which the house and premises of *Thomas Beall* were situate. In the year 1855 certain drainage works were executed by the Local Authority in that district, for the conveyance of the sewage, &c., from that district, and in order to render innocuous a certain ditch used for the conveyance of sewage. The houses and premises in the district were assessed, and *Beall* was charged with the annual payment of 15*s*. The Local Authority resolved that the assessment of houses, &c., in the district might be redeemed by the payment within a certain time of four annual payments. Accordingly, and in pursuance of such resolution, *Beall* paid a sum of 3*l*. and also a further sum of 4*l*., in respect of houses and premises for which he had been charged; and he received a receipt for that amount "in full discharge and acquittance of all sums and payments charged and assessed, and at any time payable for and in respect of the said premises, under the order of assessment made on 17th *December*, 1855." During the year 1856, the said Local Authority, under the powers given by the said Act, constructed another sewer or drain at or near *Muswell Hill*; which, in the opinion of the said Local

Authority, was necessary to render innocuous a certain ditch or watercourse at or near *Muswell Hill*, for the conveyance of water, filth, &c., and which was a nuisance. The houses using this sewer or drain were assessed to defray the expense thereof. These sewers, constructed in the *Muswell Hill* and *Maynard Street* Districts, resulted in greatly increasing a nuisance which before existed in the village of *Hornsey*; inasmuch as the sewage, in greater quantities, was brought down from the two former districts to the open ditches in the village; and, to remove such nuisances, works on a larger scale became necessary. In the year 1859 divers drains and watercourses in the *Crouch End* District and in the village of *Hornsey*, used for the conveyance of water, filth, &c., became and were nuisances, and could not, in the opinion of the Local Authority, be made innocuous without the laying down of a sewer and other structures along the same; and thereupon the said Local Authority did lay down a sewer at the village of *Hornsey* and at *Crouch End*, and on the completion thereof it was resolved by the said Local Authority that the drainage of *Maynard Street*, *Muswell Hill* and *Crouch End*, and in the village of *Hornsey*, should be considered as one system; that the total cost of the different works should be ascertained; and that all persons using, for the purposes mentioned in the said Act, the sewers, drains, &c., should be assessed at an equal rate towards the expenses incurred. Accordingly, all the houses, buildings and premises in all the four districts, which were alleged to use, for the purposes mentioned in the Act, the sewers, drains, &c., were assessed by an assessment dated 19th *December*, 1859. Among others, the said *Thomas Beall* was assessed, and, as he refused to

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pay, he was summoned before the justices named in the rule, who, after hearing the evidence, refused to grant a distress warrant. There were counter affidavits as to whether *Beall* did or did not use the new sewer or drain made in 1859, he swearing that he did not, and the surveyors for the Local Authority swearing that he did. It appeared, however, that the village of *Hornsey* was situated on a lower level than *Muswell Hill* and *Maynard Street*, and that the waters, &c., from the two latter districts ran down towards the village.

Montagu Smith and *Aspland* now shewed cause. The Local Authority exceeded their powers in assessing Mr. *Beall* in December, 1859. The Nuisances Removal Act for *England*, 1855, 18 & 19 *Vict. c. 121. s. 22.*, enacts that "Whenever any ditch, gutter, drain, or watercourse used or partly used for the conveyance of any water, filth, sewage, or other matter from any house, buildings, or premises, is a nuisance within the meaning of this Act, and cannot, in the opinion of the Local Authority, be rendered innocuous, without the laying down of a sewer, or of some other structure along the same or part thereof, or instead thereof, such Local Authority shall and they are hereby required to lay down such sewer or other structure, and to keep the same in good and serviceable repair;" "and such Local Authority are hereby authorized and empowered to assess every house, building, or premises then or at any time thereafter using, for the purposes aforesaid, the said ditch, gutter, drain, watercourse, sewer, or other structure, to such payment" "as they shall think just and reasonable." It appears from the affidavits that Mr. *Beall's* house and premises, in respect of which it is now sought to assess him, are

situate in *Maynard Street* District; that the nuisance in that district was rendered innocuous by the Local Authority in the year 1855; and that Mr. *Beall* was then assessed to and compounded for his share of the expense of the drainage works necessary for that purpose. The power of the Local Authority to assess him, under sect. 22, was therefore fully exercised in 1855; and he is not liable to assessment in respect of the cost of drainage works made four years afterwards in an entirely distinct district. [*Cockburn C. J.* The Local Authority having resolved that the drainage of all the districts shall be considered as one system, what is there to prevent the assessment of all houses using that system for drainage purposes?] Houses situate in *Maynard Street* District cannot be said to use the system, inasmuch as the drainage of that district was completed before the system was formed and the drainage works in the other districts executed. In *Regina v. Tatham* (a) this Court held that the Local Authority has no power, under sect. 22, to assess property beyond the limits of their local jurisdiction. The question whether houses situate within the jurisdiction could be said to use a sewer beyond its limits was mooted but not decided. Lord *Campbell C. J.*, however, appears to have thought that they could not, inasmuch as they derived no benefit from the sewer. He said "I have great doubts whether it is made out that these houses used the sewer within the meaning of the section. The sewage from them flowed to an open ditch, where it was a nuisance, but no nuisance to them. That ditch is now covered up, and the sewage flows through it as it formerly did. I do not see how the situation of these houses is improved at all; and if they are to be considered as using the

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(a) 8 E. & B. 915,

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covered ditch, the argument might go to make property liable for the expense of covering in an open ditch many miles distant." So, in the present case, the nuisance which made the construction of the sewers necessary, in 1859, was no nuisance to the houses in *Maynard Street* District. "Innocuous," in sect. 22, must mean innocuous to the houses using the ditch, gutter, drain, or watercourse which is a nuisance. [*Cockburn* C. J. The whole question turns upon the meaning of the word "using." I strongly incline to think that every one uses a drain, the sewage from whose house communicates with it. The only restriction upon the power of the Local Authority to assess is that established by *Regina v. Tatham* (a), namely, that they cannot assess property out of their district. But there is nothing in the Act to prevent them from constituting several districts into one aggregate district, and assessing all property which uses the drainage within that district.] Four separate and distinct districts having been first constituted, houses in any one of them, which have been assessed there and derive no benefit from the sewers in the others, ought not to be re-assessed in respect of those sewers. [*Cockburn* C. J. The case appears to me to fall exactly within the language of sect. 22; and such a construction is clearly just and equitable.]

Honyman was not called upon to argue in support of the rule.

Per CURIAM (b). The rule must be made absolute.

Rule absolute.

(a) 8 E. & B. 915.

(b) *Cockburn* C. J., *Hill* and *Blackburn* Js. *Wightman* J. was absent.

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The QUEEN against GOSSE and another, Justices of SURREY. Monday,
November 19th.

BADELEY had obtained a rule calling upon *Henry Gosse* and *Robert Carter*, Esquires, two justices of *Surrey*, to shew cause why a certiorari should not issue to remove into this Court, an order, under their hands and seals, for the payment by the surveyors of highways for the parish of *Ewell* of the sum of 502*l.* 4*s.* 3*d.*, being the amount alleged to have been expended for sewers and structural works done by the Local Authority, under The Nuisances Removal Act for *England*, 1855.

The rule was moved on behalf of *William Hobman*, a landowner and ratepayer in the parish of *Ewell*; and the following facts appeared from the affidavits. In the year 1857, a nuisances removal committee was constituted under the provisions of the Act. Before the committee was appointed, there was a drain or sewer

By The Nuisances Removal Act for *England*, 1855, 18 & 19 *Vict.* c. 121. s. 22., whenever any drain used for the conveyance of sewage from any house, buildings, or premises, is a nuisance, and cannot, in the opinion of the Local Authority, be rendered innocuous without the laying down of a sewer, the Local Authority are empowered and required to lay down such sewer,

and are authorized and empowered to assess every house, building, or premises using the same, to such payment as they shall think just and reasonable. By sect. 3, in a place where a nuisances removal committee constitutes the Local Authority, the surveyors of highways for the time being of such place are made ex officio members of the committee. And by sect. 7, "all charges and expenses incurred by the Local Authority in executing this Act, and not recovered as by this Act provided, may be defrayed" in such a place "out of highway rates, or any fund applicable in aid or in lieu thereof."

A nuisances removal committee having, under sect. 22, laid down a sewer to render innocuous a drain constructed before the passing of the Act by the then surveyors of highways: Held, that whether or not by reason of sect. 7 the highway rates were available as an auxiliary fund towards defraying the expenses thus incurred, the committee were bound, before resorting to that fund, to assess in the first instance, under sect. 22, the houses, buildings and premises using the sewer.

An order of justices not warranted by the provisions of an Act of Parliament, may be removed into this Court by certiorari, though the Act contains a section taking away the certiorari.

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extending through part of the village of *Ewell*, for more than 350 yards, into a brook running nearly at right angles to it; and such drain had been used for carrying off the sewage and refuse water from the houses on the west side of the street in *Ewell*. The then surveyor of highways had enlarged this drain, so as to carry off the sewage from divers of the houses on both sides of the street. The brook into which the drain discharged itself, after receiving the water therefrom, ran through a public horse pond or watering place, much used by farmers and others in the neighbourhood. The water of the brook was also used by the inhabitants of the village for domestic purposes. In the year 1859, the committee, in consequence of numerous complaints being made, determined to make a new sewer; and accordingly they did make a new one, running alongside of and connected with the old sewer, which had been made by the surveyor of highways; and also continued the two together more than 1000 yards beyond the point at which the old sewer ended. By means of such drains a large number of houses were enabled to discharge their refuse into the improved sewer, and the inhabitants derived great benefit therefrom; but *William Hobman* did not participate in that benefit, inasmuch as his property was as much as a mile distant. The persons who used the side drains paid for the making of them.

On 16th *May*, 1860, an application was made to the two justices for an order upon the surveyors of highways for the payment of the sum of 502*l.* 4*s.* 3*d.*, expended by the said committee. It appeared that the surveyors had that amount in their hands, ready to be paid. The assessment of the houses or buildings using the sewer

had been made; and the committee alleged they were entitled to get the amount from the surveyors of highways, in consequence of the expenditure having been incurred for the public benefit and advantage. The two justices made the order.

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Garth now shewed cause. The order was rightly made. By The Nuisances Removal Act for *England*, 1855, 18 & 19 *Vict. c. 121. s. 3.*, the surveyors of highways are made ex officio members of the nuisances removal committee; it appears, moreover, from the affidavits, that before the Act was passed the former surveyors of highways for *Ewell* had taken to and enlarged the drain which has been turned into an improved sewer by the committee; and that the present surveyors have funds in hand sufficient to satisfy the committee the expenses of the improvement. All these circumstances shew that it is right and proper that the surveyors should be called upon to make this payment. Sect. 7 of the Act enacts that "All charges and expenses incurred by the Local Authority in executing this Act, and not recovered as by this Act provided, may be defrayed" "out of highway rates, or any fund applicable in aid or in lieu thereof, where the Local Authority is a highway board, or a nuisances removal committee." As the highway surveyors form part of the committee, there was in fact no necessity for an order of justices on them to pay the money over to the committee. The other side will contend that, before having recourse to the highway rates, the committee were bound to proceed under sect. 22, which, after authorizing them to render a nuisance innocuous by laying down a sewer, or some other structure, empowers them to assess every house,

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building, or premises using the sewer or other structure, to such payment as they shall think just and reasonable. Assuming, however, that the improvements in the old drain which have been effected by the committee, in the present case, are such structural sewerage works as are contemplated by that section; still, in such a case, where the works have been executed for the benefit of the whole of the public, the committee are justified in defraying the expense out of the highway rates instead of levying it by assessment. [*Cockburn C. J.* Many of those who contribute to the highway rates may derive no benefit from, and make no use of, the sewers. It appears just and reasonable that, as sect. 22 points out, the houses, &c., which derive benefit should be assessed in the first instance.] That section leaves the committee a discretion. But, further, sect. 39 enacts that no "order, nor any other proceeding, matter, or thing done or transacted in relation to the execution of" the "Act," shall "be removed or removable by certiorari" "into any of the superior Courts." The justices had power to make the order now in dispute, and the applicant has mistaken his remedy in seeking to remove it into this Court. By sect. 22 the provisions of that section are to "be deemed to be part of the law relating to highways in *England*." By The General Highway Act, 5 & 6 W. 4. c. 50. s. 44., the surveyors of highways are required, yearly, to make out their accounts and lay them before the justices at a special Sessions for the highways; and any one chargeable to the highway rate may then complain to those justices with respect to such accounts, or the application of the moneys received by the surveyors. That, therefore, was the course which the applicant ought to have adopted.

Badeley, contrà. Conceding that the works which the nuisances removal committee have executed are beneficial to the public, the real question is not thereby affected; being, whether the justices had any jurisdiction to make an order for the payment of the expense out of the highway funds, until the means of raising the money provided by sect. 22 had been first exhausted. That section shews clearly that the policy of the Legislature is that those parties who create, and those who benefit by the suppression of, a nuisance, shall bear the charges consequent upon its abatement, to the extent of their ability to pay. At most the effect of sect. 7 is to make the highway rate an auxiliary fund, which may perhaps be resorted to if the whole expense cannot be raised by assessment under sect. 22: but not otherwise. (He was then stopped.)

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COCKBURN C. J. Mr. *Badeley* has said enough to satisfy us that this rule must be made absolute. The affidavits shew clearly that the works which have been executed fall within the provisions of sect. 22 of the Act; and it follows that the fund pointed out by that section is the fund primarily chargeable with the expense of them. It is unnecessary to determine whether, if that fund failed, the nuisances removal committee could, under sect. 7, resort to the highway rate to make up the deficit; for there is nothing to shew us that recourse has been had in the first instance to the proper fund. It is further said that sect. 39 takes away the jurisdiction of this Court to issue the certiorari; but that section can apply only to cases in which the justices have jurisdiction. It cannot be said that they have jurisdic-

1860. tion to make an order clearly contrary to the provisions
 of the Act; or that sect. 39 protects such an order when
 made.

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Rule absolute for a certiorari.

It was agreed that the officer, when brought up in obedience to the writ, should be quashed.

Thursday,
 November 15th.
 Monday,
 November 19th.

MATTHEWS against GIBBS and others.

Defendants,
 London mer-
 chants, by
 charterparty
 made between

DECLARATION for money payable by defendants
 to plaintiff for freight of goods, and in respect of

them and C., the master of the ship *Planter*, chartered that ship to bring a cargo of guano from *Callao* to *England*. The ship was, by the charterparty, consigned outwards to defendants' agents in *South America*; and freight at 70s. per ton was made payable on her arrival in *England*, deducting such advances on account of freight as charterers' agents might, as the charterparty empowered them, make to C. in the *Pacific*. The *Planter* arrived at *Callao*, loaded her cargo of guano, and set sail for *England*, defendants' agents having, previously to her sailing, made large advances to C. on account of freight. Soon after sailing she sprang a leak, which compelled her to put back to *Callao*, and she arrived there the second time, consigned to a firm independent of defendants or their agents. It was then found that she could not proceed on her voyage, and C., defendants' agents refusing to interfere, trans-shipped the cargo into another ship, *The Alarm*, to be forwarded to *England*. For this purpose a charterparty was entered into between plaintiff, the master and apparent owner of *The Alarm*, and C. in his own name; under which freight was made payable by the consignees, on ship's arrival in *England*, at 70s. per ton. Plaintiff then made out bills of lading, in which C. was named as shipper and defendants as consignees. At the date of this latter charterparty the current rate of freight at *Callao* was only 40s. per ton, and it was agreed between plaintiff and C. that plaintiff should pay the difference between that and the charterparty freight to C., but whether for C.'s benefit or that of his owners did not appear. The cargo arrived in *England*, in *The Alarm*; when plaintiff claimed from defendants the full freight of 70s. per ton; from which defendants, on the other hand, insisted on their right to deduct the advances made to C. by their agents at *Callao*. Defendants having paid the freight less the amount of such advances, plaintiff brought this action to recover that amount.

A verdict having been taken, by consent, for plaintiff, for this amount, leave being reserved to defendants to move to enter it for them, the Court to have power to draw inferences of fact from the above facts, which were proved at the trial; Held, making absolute a rule to enter the verdict for defendants: First, that the proper inference from the facts was that C. made the charterparty with *The Alarm* as agent for his owners and not for defendants; the agreement by plaintiff to return him part of the charterparty freight being a legitimate transaction in that view, but a gross fraud on defendants, to which plaintiff was a party, in the other. Secondly, that assuming C. to have made the said charterparty as defendants' ostensible agent, he had no implied authority, from the necessity of the case, on trans-shipping the cargo, to bind defendants to payment of a

plaintiff having, at the request of defendants, delivered up to defendants certain goods on which plaintiff had a lien for freight, and thereby waived the said lien; and upon an account stated.

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Pleas. 1. Except as to 302*l.* 14*s.* 9*d.*, Never indebted. Issue thereon. 2. Except as aforesaid, Payment. Issue thereon. 3. As to 302*l.* 14*s.* 9*d.*, Payment into Court. Replication of damages ultra. Issue thereon.

At the trial, before Cockburn C. J., at the Sittings in London, after last Hilary Term, a verdict was taken for the plaintiff, by consent, for 700*l.*, and leave was reserved to the defendants to move to enter it for them: the Court to have power to draw, if necessary, inferences of fact from the evidence adduced, which consisted of the examination of the plaintiff, taken in London, and of depositions of C. E. Stubbs and M. Crosby, taken under a commission in Lima; together with certain material documents.

The action was brought to recover the balance of freight for a cargo of guano, in the ship *Alarm*, from Callao to England, after giving credit to the defendants for 3600*l.*, paid by them before action.

The facts were as follows. The defendants, merchants of London trading under the name of Anthony Gibbs & Sons, in October, 1857, chartered an American vessel called *The Planter*, to proceed from Liverpool to South America, and bring a cargo of guano thence to the United Kingdom. The following are the material parts of the charterparty, which was signed by the defendants and by J. D. Carlisle, who was master of the ship, but whether owner also, as stated in the charterparty, did not appear.

higher than the current rate of freight; and plaintiff had knowledge of that want of authority. Thirdly, that, apart from *The Alarm* charterparty, plaintiff had no lien on the cargo for a greater amount of freight than the balance due after crediting defendants with the advances to C.: for that assuming (a point which the Court did not decide), that upon a trans-shipment of cargo arising from necessity, in a port of distress, in order to its being forwarded to its destination, the original shipowner can transfer his lien for freight to the substituted shipowner, he can transfer no greater right of lien than he himself possesses.

"London, October 12th, 1857.

"Charterparty.

"It is hereby mutually agreed between Captain

1860. *Carlisle*, owner of *The Planter*, 3rds veita, 1988 tons register, new measurement, on the one part, and Messrs. *Matthews & Sons*, merchants and agents, on the other part, as follows. That the said vessel, now lying at the port of *Liverpool*, shall sail on or before 1 November, 1857, to *Melbourne*, and thence proceed with all convenient despatch to the port of *Callao*, Peru, where the captain shall immediately report his vessel to Messrs. *William Gibbs & Co.*, of *Lima*. That the said vessel, being then tight, staunch and strong, and well conditioned for the voyage, Messrs. *William Gibbs & Co.* shall, within forty-eight hours after such report being received, send to the captain, or his agents, orders for loading a cargo of guano at the *Chincha Islands*, to which place the vessel shall at once proceed, calling on her way at *Pisco* to obtain the necessary pass to land, which shall be given to the captain by the charterers' agents, free of expense, within twenty-four hours of his application. After completing her load of guano, and having obtained the necessary pass from *Pisco*, the vessel shall return for her final clearance to *Callao*, where the captain shall have the liberty of taking in passengers, light goods, and specie on freight for the benefit of the ship. The charterers to have the option of shipping light goods at current rates." "The owners of the vessel to pay all port charges, and the ship to be consigned to Messrs. *William Gibbs & Co.*, of *Lima*, to whom the customary agency for doing the ship's business shall be paid by the owners. The captain to sign bills of lading at such rates of freight as the charterers, or their agents, may direct, and without prejudice to this charterparty. The said vessel shall, after completing her loading as before mentioned, proceed to any safe port in the *United Kingdom* or the Continent, not south of *Ostend* nor north

Hamburgh, nor in the *Baltic*, calling at *Cowes* for orders from Messrs. *Anthony Gibbs & Sons* (and for which she is to remain until return of post from *London*), unless ordered in writing to proceed to any given port by Messrs. *William Gibbs & Co.*; and there, according to bills of lading and charterparty, deliver the cargo, which is to be discharged and taken from alongside at the rate of not less than thirty-five tons per working day. The freight to be paid in manner hereinafter mentioned, at the rate of 70s. sterling in full, per ton of 20 cwt. net weight of guano at the Queen's beam, subject, however, to a deduction from the water contained in damaged guano. The master to be supplied, in the *Pacific*, with a sum not exceeding 1500*L.*, free of interest and commission, but the cost of insurance to be borne by the owners; and the amount so to be advanced, and the cost of insurance thereof, shall be in part payment of the freight, at the rate of 50*d.* per dollar currency. And should the charterers or their agents think fit to advance the master, beyond the said sum of 1500*L.*, any sum for repairs, stores or other disbursements whatsoever, such sums, with interest, commission and insurance, shall be in part payment of freight at the exchange aforesaid. And it is hereby expressly agreed that the receipt of the master for any such sum or sums of money as shall be supplied or advanced to him by the charterers as aforesaid, shall be conclusive and binding upon the owners; and they shall thereby be prevented, as between them and the charterers, from inquiring into the necessity for, or appropriation of, the sum of money which, in such receipt or receipts, shall be acknowledged to have been received; and all contributions to general average losses which (if any) shall become payable in

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respect of any such advances as aforesaid, shall be borne and paid by the owners. The freight to be paid in manner following, that is to say, 2000*l.* in cash on arrival at the port of discharge, three months' interest at the rate of 5*l.* per cent. per annum being deducted, and the balance, after deducting all such sums of money as shall become payable to the charterers under the provisions herein contained, on the true and right delivery of the cargo, by bills upon Messrs. *Anthony Gibbs & Sons*, at three months' date, or in cash, less interest at 5*l.* per cent. per annum, at charterers' option. The charterers are hereby authorized to retain and deduct from the freight all such damages and sums of money, as well liquidated as unliquidated, to which the owners shall become liable to the charterers by virtue of, or in anywise in relation to, this charterparty, it being the intention of the parties that all claims and demands, of whatever nature, which shall accrue to the said charterers, shall be treated as payments made by the charterers on account of freight. The charterers to have the liberty of naming the docks in which the ship is to discharge."

The Planter proceeded to *Callao*, and duly loaded a cargo of guano at the *Chincha Islands*, and returned thence to *Callao*, and received final orders from Messrs. *William Gibbs & Co.*, of *Lima*, to sail for *England*. She set sail accordingly, in *May* or *June*, 1858. Previously to her sailing, *W. Gibbs & Co.* had advanced to *Carlisle*, the master, 1018*l.* 12*s.* 5*d.*, and had received his receipt for that amount. Soon after sailing, *The Planter* was compelled to put back to *Callao*, having sprung a leak; and she was then consigned to Messrs. *Crosby & Co.*, of *Callao*. It having been ascertained, by survey, that it would be necessary to discharge her cargo, *Carlisle*,

the master, *W. Gibbs & Co.* declining to interfere (a), engaged two other *American* vessels, *The Alarm* and *The H. D. Brookman*, to take the cargo to *England*; and the cargo was accordingly trans-shipped into those two vessels.

The charterparty of *The Alarm*, which was signed by *Carlisle* and the plaintiff, was, so far as is material, as follows.

" *Callao*, June 18th, 1858.

" Charterparty to take ship *Planter's* cargo.

" It is hereby mutually agreed between *Nathaniel Matthews*" (plaintiff), "master and owner of the ship *Alarm*, 1184 tons register, new measurement, on the one part, and *John D. Carlisle*, master of the ship *Planter*, on the other part: That the said vessel, then being tight, staunch, strong and well conditioned for the voyage, after completing her loading of guano at *Callao*, where the captain shall have the liberty of taking in passengers, light goods and specie on freight, for the

(a) It appeared on the evidence that the charterparty and bill of lading of *The Alarm* were on forms supplied by *W. Gibbs & Co.*, and that she was examined at their suggestion and approved by their surveyor. Also that several interviews took place between them and the captains of all three ships, *Callao* being only six miles from *Lima*. The presumption, however, from these facts that *W. Gibbs & Co.* were parties to the trans-shipment of the cargo, as agents for the defendants, was displaced by the deposition of *C. E. Stubbs*, the acting partner in the firm of *W. Gibbs & Co.*, who stated that he refused to interfere, *The Planter*, on putting back, not being consigned to his firm, and as he considered that *Carlisle* was bound to act in the best way for all concerned. He also stated that he supplied the forms as an act of courtesy, to save trouble; and that *Carlisle* informed him that the chartered freight of *The Alarm* was to be 40s., and he did not see the charterparty till a copy was sent, with the bills of lading, to his firm for the defendants.

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benefit of the ship; the charterers to have the option of shipping the light goods at current rates;" "shall" "proceed to any safe port in the *United Kingdom*, calling at *Cowes* for orders from Messrs *Anthony Gibbs & Sons* (and for which she is to remain until return of post from *London*), unless ordered in writing to proceed direct to any given port by Messrs. *William Gibbs & Co.*; and there, according to bills of lading and charterparty, deliver the cargo, which is to be discharged and taken from alongside at the rate of not less than thirty-five tons per working day. The freight to be paid, in manner hereinafter mentioned, at the rate of 70s. sterling, in full, per ton of 20 cwt. net at the Queen's beam, subject, however, to a deduction for the water contained in damaged guano. The master to be supplied in the *Pacific* with a sum not exceeding £, &c. (the clause proceeded *totidem verbis* with the corresponding clause in the charter of *The Planter*.) "The freight to be paid in manner following, that is to say, 1130*l.* in cash on arrival at the port of discharge, three months' interest at the rate of 5*l.* per cent. per annum being deducted, and the balance, after deducting all such sums of money as shall become payable to the charterers under the provisions herein contained, on the true and right delivery of the cargo, by bills upon Messrs. *Anthony Gibbs & Sons*, at three months' date, or in cash less interest at 5*l.* per cent. per annum, at charterers' option. The charterers are hereby authorized to retain and deduct from the freight all such damages and sums of money, as well liquidated as unliquidated, to which the owners shall become liable to the charterers by virtue of, or in anywise in relation to, this charterparty

it being the intention of the parties that all claims and demands, of whatever nature, which shall accrue to the said charterers, shall be treated as payments made by the charterers on account of freight. Messrs. *Anthony Gibbs & Sons* shall have the right to name the dock in which the ship is to discharge."

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The plaintiff, as master of *The Alarm*, signed bills of lading which, together with a copy of the charterparty, were forwarded, through *W. Gibbs & Co.*, to the defendants, and which were as follows.

" *Callao, August 6th, 1858.* "

" Shipped in good order and condition, by Capt'n. *J. D. Carlisle*, of the ship *Planter*, at *Callao, Chincha Islands*, in and upon the good ship or vessel called *The Alarm*, now lying at *Callao*, and bound for *Cowes* for orders, whereof *Nathaniel Matthews* is master for this present voyage, a cargo of guano, of 1184 tons register, 1545 sacks, to be delivered in like good order and well conditioned at the aforesaid port to which the vessel may be ordered to discharge; all and every the dangers and accidents of the seas and of navigation, of whatever nature or kind soever, excepted; unto Messrs. *Anthony Gibbs & Sons*, or to their assigns, they paying freight for the said guano as per charterparty.

" *N. Matthews.* "

Though the freight payable under the charterparty of *The Alarm* was to be 70s. per ton, the current rate of freight at *Callao* was then only 40s.; and it was agreed between the plaintiff and *Carlisle* that the plaintiff should pay the difference of 30s. between the two rates to *Carlisle*; but whether for the benefit of the owners of *The Planter* or of *Carlisle* himself did not appear;

1860. nor did it appear whether *Carlisle* was the real owner of
 MATTHEWS *The Planter* (a).
 V.
 GIBBS. *The Alarm* sailed from *Callao* in *August*, 1858, and

duly arrived in *England*, and proceeded, by order of the
 defendants, to *London*, there to discharge at the *Victoria*

(a) The plaintiff swore in his examination that, having already advanced 500*l.* to *Carlisle*, he gave him a draft for the balance before sailing from *Callao*; and he also swore that he did not know of the advances made by *W. Gibbs & Co.* to *Carlisle*, until his arrival in *England*. *M. Crosby*, however (of the firm of *Crosby & Co.* of *Callao*), in his deposition stated that "at the time of the final closing of accounts, after *The Alarm* and *The H. D. Brookman* were loaded, there were many questions which arose between the three captains, which were the cause of a good deal of contention, and several letters and certificates passed between them. One of the contested points, according to deponent's recollection, was the advance received by the master of *The Planter* from *William Gibbs & Co.*, of *Lima*; and deponent thinks that captain *Carlisle*, of *The Planter*, gave each captain an order on some house in *Liverpool* (deponent thinks on the house of *Richardson, Spence & Co.*) for the said amount advanced by *William Gibbs & Co.* to the master of *The Planter*, in case the house of *Anthony Gibbs & Sons* should deduct the same from the freights of *The Alarm* and *The H. D. Brookman*; and deponent is quite certain that both the captains of *The Alarm* and *The H. D. Brookman* did not know of any such advance until their ships were loaded; and then they, the said captains of *The Alarm* and *The H. D. Brookman*, were more or less at the mercy of the master of *The Planter*; and they, the masters of *The Alarm* and *The H. D. Brookman*, made the best arrangements they could to recover said advance, should it be deducted by *Anthony Gibbs & Sons*; but that, although deponent was at the time fully cognisant of the above mentioned occurrences, he cannot recollect whether he was consulted or not by the masters of *The Alarm* and *The H. D. Brookman*, but recollects having consulted with the master of *The Planter*. The ship *Planter* was consigned to the house represented by him, on putting back to *Callao* in the month of *June*, 1858. Considering that the house which he represents were the consignees of *The Alarm* and *The H. D. Brookman*, he must have considered it his duty to warn the masters of the said vessels of the advance received by the master of *The Planter* on account of freight and therefore he has very little doubt but that he did so in due course although unable at the present moment positively to swear to the fact.

Docks. The defendants entered the cargo in their own names; but when the plaintiff applied to them to pay him the whole freight at 70s., as per charterparty, they claimed to deduct the 1018*l.* and other small sums, which their agents, *W. Gibbs & Co.*, had advanced to the captain of *The Planter*. In order to prevent delay and consequent demurrage, the following agreement was then entered into between the plaintiff and the defendants.

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“*London, December 14th, 1858.*

“It is agreed between the undersigned, in order to prevent delay in discharging the cargo of *The Alarm*, that the discharge shall proceed, and the delivery be made to Messrs. *Anthony Gibbs & Sons*, the consignees named in the bill of lading; they undertaking to pay the freight according to the charterparty, less the proportion of the sum of 1089*l. 9s. 4d.* advanced by Messrs. *A. Gibbs & Sons* on account of freight to the captain of *The Planter*, in whose vessel the cargo now in *The Alarm*, as well as that by *The H. D. Brookman*, was originally shipped; it being understood that this arrangement shall not prejudice the owner's right to recover the balance claimed for freight upon the cargo in *The Alarm*, nor the right of Messrs *A. Gibbs & Sons* to have the said cargo delivered to them without paying any freight, or after deducting the said sum of 1089*l. 9s. 4d.*, or a proportionate part thereof.”

Payments were accordingly made by the defendants on account, before action, to the amount of 3600*l.*, which, together with the amount paid into Court after action brought, it was agreed, reduced the plaintiff's claim to 700*l.*: which sum, being the amount for which the verdict was taken, was agreed to be *The Alarm's*

1860. proportion of the 1089*l.* 9*s.* 4*d.* advanced to the captain of *The Planter*, distributing the whole advances between *The Alarm* and *The H. D. Brookman* in proportion to the bulk of their respective cargoes.

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Sir William Atherton, Solicitor General, in last *Easter* Term obtained a rule, pursuant to the leave reserved, to enter a verdict for the defendants, on the grounds, first, that the sum paid into Court satisfied the whole of the plaintiff's claim; secondly, that the defendants were entitled to the benefit of the advances made to the captain of *The Planter*; thirdly, that the said captain had no authority to make the charter with *The Alarm* for 70*s.*, so as to bind or affect the defendants; fourthly, that the guano was the property of the defendants, and the plaintiff had no legal lien.

Bovill and *J. Kaye* now shewed cause (a). First, the defendants are not entitled to deduct from the plaintiff's claim the advances made by *W. Gibbs & Co.* to the captain of *The Planter*, for the plaintiff swears, and the facts shew, that he was not informed by them, and did not know, before his arrival in *England*, that those advances had been made. Secondly, assuming the fact to be that *W. Gibbs & Co.* were no parties to the transshipment of the guano from *The Planter* to *The Alarm*, but refused altogether to interfere, still, *Carlisle*, the master of *The Planter*, had, under these circumstances, authority as master to bind the defendants, as owners of the cargo, to payment of the 70*s.* per ton, the charter-party freight agreed upon between him and the plaintiff. If transshipment of the goods becomes necessary, in the

(a) *Thursday, November 15th.*

course of the voyage, by reason of the inability of the original ship to carry them any further; and if the charterers' agents, being thereupon applied to by the master, refuse to interfere; the necessity and exigency of the case gives the master authority to bind, as agent, the charterers as well as his owners to the terms of the trans-shipment. The law upon this subject is clearly stated as follows in *Kent's Commentaries*, vol. 3, p. 296 (ed. 10; p. 212 of original edition). "The *English* rule undoubtedly is, that if the ship be disabled from completing the voyage, the ship owner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; and he has no right to any freight, if they be not so forwarded, unless it be dispensed with, or there be some new contract upon the subject. In this country (a) we have followed the doctrine of *Emérigon*, and the spirit of the *English* cases, and hold it to be the duty of the master, from his character of agent of the owner of the cargo, which is cast upon him from the necessity of the case, to act in the port of necessity for the best interest of all concerned; and he has powers and discretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination. If there be another vessel, in the same or in a contiguous port, which can be had, the duty is clear and imperative upon the master to hire it; but still the master is to exercise a sound discretion adapted to the case. He may trans-ship the cargo, if he has the means, or let it remain. He may bind it for repairs to the ship. He may sell part, or hypothecate the whole. If he hires another vessel for

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the completion of the voyage, he may charge the cargo with the increased freight, arising from the hire of the new ship." In *Shipton v. Thornton* (a) it was held that, whether or not the master of a general ship, which is prevented from completing the voyage by damage occasioned by tempest, is bound, he is at any rate at liberty, if he has an opportunity and thinks fit, to forward the goods, shipped on board, to the place of destination, by some other conveyance equally cheap; and is entitled, if the goods, so trans-shipped, arrive at their destination and are obtained by the freighter, to the whole freight originally contracted for; though the goods are carried by the second conveyance for less than the freight originally contracted for. In delivering the judgment of the Court, which contains a careful review of the authorities, Lord Denman C. J. says, "One question" "has been asked, which it will not be right to pass over, What, it has been said, if the transshipment can only be effected at a higher than the original rate of freight? Which party is to stand to that loss? By the *French Ordinance* and the *Code de Commerce*, and according to the decisions in *America* (to which Chancellor *Kent* refers), the shipowner is entitled to charge the cargo with the increased freight, and, as a consequence of that rule, it becomes an average loss; and, in case of an insurance, must be made good by the insurers; *Emérigon, Traité des Assur.* ch. xii. s. 16, *Code de Com.* 350. No case of the sort that we are aware of has occurred in this country; nor is it necessary for us to express any opinion further than as it bears on the present

(a) 9 A. & E. 314. 336, 337.

question. It may well be that the master's right to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighter; and that, where the freight cannot be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant. For it must never be forgotten that the master acts in a double capacity, as agent of the owner as to the ship and freight, and agent of the merchant as to the goods: these interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and, therefore, the owner's right to tranship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and, if so, it will be the duty of the master as his agent to do so. *In such a case*, the freighter will be bound by the act of his agent, and of course be liable for the increased freight." That decision is a clear authority that the defendants in the present case are liable, the cargo having been trans-shipped from *The Planter* to *The Alarm* on the original terms as to freight, and no further charge having been occasioned to the freighters, the defendants. [Cockburn C. J. The chief question is, as whose agent did *Carlisle*, the master of *The Planter*, act in making the trans-shipment? Did he not act merely in the interest of his owners, to enable

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them to earn the original freight? *Hill J., Shipton v. Thornton* (a) decides that the master, acting for his principals, his owners, may do all that is necessary, by transshipping the cargo, to enable them to earn their original freight. The passage cited from the judgment shews that, if the freight on trans-shipment is higher than that original freight, the question arises whether the necessity of the case was such as to authorize the master to act as agent also for the cargo owners, and bind them by his contract to pay the higher rate. Such a question, however, cannot arise here; for whereas the original freight was 70s. a ton, the current freight from *Callao*, at the time of the trans-shipment, was only 40s. Moreover, in cases where the question does arise, Lord *Denman* C. J. proceeds to say that as "circumstances make it necessary, on the one hand, to repose a large discretion in the master," "the same circumstances require that the exercise of that large discretion should be very narrowly watched."] The other side will rely on *Gibbs v. Grey* (b); but that case is distinguishable. It was there held that the master of a disabled ship could not make a special contract, binding the owners of cargo trans-shipped therefrom, for the conveyance of the cargo in a substituted ship to its destination: but the judgment proceeded on the ground that the cargo owners had an agent, to the knowledge of the master, at the port of distress, and that the master had not, as he was bound to do, communicated with that agent, or given him the option of receiving the cargo there. The facts of the present case bring it within the principles laid down by Lord *Stowell*, then

(a) 9 A. & E. 314.

(b) 2 H. & N. 22.

Sir William Scott, as to the power of the master to bind the owners of the cargo, in his judgment in *The Gratitude* (a), as follows. "The Court would, undoubtedly, be very unwilling to relax the general obligation of masters to correspond with the proprietors, where it is practicable: but, taking the obligation to be such, the master has complied with that obligation; he applied to the correspondent of the principal consignee, and through him to the consignee who is described as owner of a part of the cargo. From him he received an answer sent by that consignee and proprietor," "expressly declining to give particular directions, and referring him entirely to his own discretion. From that conduct, I think that all the authority that might become necessary for the preservation of the cargo, was devolved upon him by the very act of the consignee, even if he had not possessed it under the general law: for if he was remitted to his own discretion, everything then which he did under that discretion, justly exercised, was expressly warranted by the act of his employer, so far at least as the interests of that particular employer were concerned." In that case it was held that, in a case of distress, a master may hypothecate his cargo on freight for repairs in a foreign port, such repairs being necessary for the prosecution of his voyage. And *Sir William Scott* laid it down that, if the lender, in such a case, has not at all acted unfairly, by taking undue advantage of the master's necessity, the contract cannot be vitiated, either in whole or in part. "It will not be sufficient, either upon principle or upon determinations of the Court," he adds (b) "that the master has taken undue advantage

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(a) 3 Rob. Ad. Rep. 240. 273.

(b) 3 Rob. Ad. Rep. 272.

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against his employer ; that is a matter between him and his employer, with which the third person has nothing to do, unless personally implicated by the facts of the transaction, in the fraud that may have been practised." (The case was then adjourned.)

Sir *William Atherton*, Solicitor General, and *Cleasby*, in support of the rule (a), were not called upon to argue.

COCKBURN C. J. We are agreed that the rule must be made absolute to enter the verdict for the defendants. The facts of the case are shortly these. The defendants, who are merchants in *London*, chartered a vessel called *The Planter* to bring a cargo of guano to this country, at a freight of 70s. a ton. Advances to a considerable amount, on account of freight, were made by the agents of the defendants to the captain of *The Planter* in *South America*. After the guano had been shipped *The Planter*, in consequence of sea damage, became incapable of proceeding upon her voyage, and, the agents of the defendants declining to take upon themselves the transshipment of the cargo to any other vessel for the purpose of its being conveyed to its destination, the master of *The Planter*, one *Carlisle*, chartered two vessels for that purpose, in respect of one of which, *The Alarm*, the present action arises. He chartered this vessel in his own name, and took a bill of lading for the cargo shipped in her from the plaintiff, who was the captain ; which bill of lading was made out to him as the shipper, the defendants being named therein as the consignees, to

(a) *Monday, November 19th.*

whom the guano was to be delivered in this country. In the charterparty with *The Alarm*, *Carlisle* agreed to pay the same amount of freight as his owners had stipulated for in the original charterparty; but, by a private and subordinate agreement between him and the plaintiff, *Carlisle* stipulated that while the 70s. per ton should be required of the consignees on the delivery of the cargo, the plaintiff was to keep only 40s. per ton as the rate of freight as between him and *Carlisle*, and was to hand over to *Carlisle*, whether for the benefit of him or of his owners does not clearly appear, the difference between the 70s. per ton which was to be received from the defendants and the 40s. per ton for which the guano was to be conveyed to this country. The guano having arrived in *The Alarm*, the defendants, the consignees, demanded the cargo, offering to pay the difference between the amount of freight at the rate which they had contracted to pay by the original charterparty, namely, 70s. per ton, and the advances which their agents in *South America* had made to the captain of *The Planter*. The plaintiff insisted on the payment of the full freight, namely, 70s. per ton. After some discussion, the guano was delivered to the defendants without prejudice to the lien of the plaintiff, if any, for freight.

Three questions arise. First, was the contract made by *Carlisle*, when he chartered *The Alarm*, a contract made by him as the agent of the defendants, on their behalf? Secondly, if so, was it one by which the defendants were bound? And, thirdly, supposing the latter question to be answered in the negative, and that the contract entered into by *Carlisle* with the plaintiff is held to have been made by him as agent of the owners

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of *The Planter*, had those owners a lien which they could transfer to the plaintiff, so as to entitle the latter to withhold the goods until the whole of the freight had been paid?

I am of opinion that our judgment ought to be for the defendants on all three questions. In the first place, I think the contract entered into between *Carlisle* and the plaintiff must be considered as a contract entered into by him on behalf of his owners, and not on behalf of the defendants. The charterparty purports to be made by him with the plaintiff in his own name, without any mention of his acting as agent for the defendants. The bill of lading is also made out to him in his own name, as consignor, the defendants being only mentioned as the consignees. I agree that these circumstances are not conclusive. A far more important fact, in considering this first point, is, that by the contract with the plaintiff the rate of freight to be demanded by the plaintiff, as captain of *The Alarm*, on the arrival of the goods in *England*, was to be the same as that which the defendants had agreed to pay to the owner of *The Planter*, whereas the rate of freight actually to be paid to the plaintiff, as between *Carlisle*, who made the charterparty, and the plaintiff, was a much smaller rate. Now, it was perfectly competent to *Carlisle*, on behalf of the owners of *The Planter*, to make such a contract: for it is well established that when the shipowner, who has contracted to carry goods under a charterparty to a given place of destination in a particular bottom, finds that by some vis major he is prevented from fulfilling his contract, it is open to him, for the purpose of carrying out the contract so far as he can, and earning the freight to which he is entitled under it, to forward the

goods to their destination in a substituted bottom ; and there is nothing to prevent his doing that upon the most advantageous terms to himself which the circumstances will admit of. If he sends the goods to their destination, it is immaterial to the owners, so long as they get them delivered at the freight agreed on, whether the original shipowner, when obliged to substitute another ship for his own, gets the goods conveyed to their destination at the freight originally agreed upon, or for less ; and therefore, if the shipowner, under circumstances authorizing him to trans-ship the goods, is enabled to get them conveyed at a lower rate of freight, there is no objection to his having the benefit. In this view it was a perfectly legitimate transaction on the part of the master of *The Planter*, acting for his owners, to make an agreement with the plaintiff that the same rate of freight should be charged to the defendants which, by the original charterparty, they had stipulated to pay ; while the substituted shipowner should receive a less freight, the difference going to the benefit of the original shipowners. On the other hand, if *Carlisle*, in making this contract, had been acting as the agent of the defendants, he would have been guilty of a gross fraud. For it is plain that when the captain of the original shipowner, from the necessity of circumstances, takes upon himself to act as the agent of the owner of the goods, it becomes his duty to do his best for the interest of the latter, and to make the best bargain he can for the conveyance of the cargo to its destination. Therefore, if *Carlisle*, not deeming it expedient, or finding himself unable, to forward the goods in another bottom on account of his owners, took upon himself, under the necessity of the case, to do so as the agent of the defendants, he would

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no longer have any right to look to the interest of his owners: his sole business would be to consider the interest of the owner of the goods. This being so, if he was acting as the agent of the defendants, his agreeing to pay for the conveyance of the guano at the rate of 70s. per ton, when he could have got it conveyed for 40s., would have been a gross act of fraud; and it would have been equally fraudulent in his owners to pocket the difference. Now the plaintiff, who was captain of *The Alarm*, knew all the circumstances, and would therefore necessarily have been a party to the fraud. On the whole, then, I think that, as the contract entered into by *Carlisle* with the plaintiff, if made on behalf of his owners, would be a legitimate transaction, whereas, if made by him as the agent of the defendants, it would be grossly fraudulent, and this to the knowledge of the plaintiff; the proper inference from these facts is, that it was a contract entered into by him on behalf of his owners, and therefore that it is not binding on the defendants.

In the second place, looking at the case irrespective of this consideration, let us see whether, even if *Carlisle* did enter into this contract of charterparty with the plaintiff, as agent of the defendants, he could bind the defendants by the contract. I am clearly of opinion that he could not. I am not disposed to question the doctrine, in support of which *Shipton v. Thornton* (a) was cited, that the master of a trading vessel, although primarily the immediate agent of the shipowner, yet, if the vessel in which the cargo has been shipped becomes incapable of conveying it to its destination by the inter-

(a) 9 A. & E. 314.

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vention of some vis major, and the shipowner will not or cannot transmit the goods to their destination, has, arising out of the necessity and exigency of the circumstances, an implied authority to act as the agent of the owner of the goods, and to do what may be expedient for sending them to their destination, on the best terms that he can make. But it must be understood that this implied authority of the master is co-extensive with and limited by the necessity out of which it arises, just as it also is where he acts, under extraordinary circumstances, as the agent of his owners, with regard to pledging their credit, or the ship itself, for necessities for the ship. This is obviously reasonable with reference to those with whose interests the master is dealing in their absence : while there is nothing unreasonable in requiring of a person making a contract with a master, whether acting on behalf of the shipowner or of a goods owner, that, knowing that the implied authority of the master arises out of the necessity of the case, and having, from being on the spot, every opportunity of inquiry, he shall take all reasonable means to satisfy himself of the existence of the necessity out of which alone the authority can arise. Now, in this case, it is clear that there was no necessity for the contract into which *Carlisle*, the master, entered. There might be a necessity, indeed, under the particular circumstances of the case, for his procuring other vessels, in order to transmit the cargo to its place of destination ; but there was none for his entering into a contract to pay freight at the rate of 70s. per ton. And not only was this so, but the absence of any such necessity was known to the plaintiff, seeing that by the contract with him it was stipulated that, while 70s. a ton should be demanded of the defendants, the guano

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should actually be conveyed at 40s. per ton. I am of opinion, therefore, that the contract, if entered into by the captain as agent of the defendants, was bad on two grounds: first, as being fraudulent, and fraudulent to the knowledge of the plaintiff; secondly, as being beyond the limits of any authority which the captain could exercise in the position in which he was placed.

There being, then, no contract to bind the defendants we come to the remaining question, namely, whether if the contract with the plaintiff be considered as one entered into by *Carlisle* on account of his owners, there is any right of lien in the plaintiff which could entitle him to withhold the delivery of the goods from the defendants: for it was agreed that the goods should be given up without prejudice to any lien of the plaintiff; and, if any lien existed beyond the amount which has been paid, the plaintiff must succeed in this action. The question turns upon whether the defendants are entitled to deduct, as against the plaintiff, the advances made on account of freight to the owners of *The Planter*. And here a question presents itself which may be open to some doubt. Although the original shipowner may be entitled, on account of the physical impossibility of conveying the goods to their destination in the bottom originally contracted for, to employ another to convey the goods and receive the freight, can he, when he parts with the possession of the goods, transfer his right of lien to the substituted shipowner? I by no means desire to be understood as saying that he cannot. It may be that the same rule of law which empowers the original shipowner, under circumstances of necessity, to trans-ship the goods, and, by sending them to the place of delivery in another ship, to retain his right to recover

the freight as against the owner of the goods, gives also, at the same time, as incidental to this right, that of transferring also the lien which he would have had upon the goods for the freight, if he had himself conveyed them to their destination. But it is not necessary to decide that question in the present case. It is enough to say that, supposing the right exists to transfer the lien under such circumstances from one shipowner to the other, at all events the first can transfer to the other no greater right of lien than he himself possessed. The utmost which the plaintiff can claim, if the second charter be considered, as it must be, as one between *Carlisle* and him, is to stand in the shoes of the original shipowners, for whom *Carlisle* was acting. Then, what was the lien which these owners had at the time the goods were transferred? Not a lien on the goods for the whole of the freight; for considerable advances had been made on account of the freight, and the lien of the owners of *The Planter* remained only for the residue. The defendants were entitled to demand the delivery of their goods, had they been in the hands of the original shipowners, on payment of the balance, and the lien of such shipowners could exist only for that balance. The plaintiff, who is substituted for the original shipowners and stands in their place, can be in no better condition; and therefore, on the payment of the balance due on the original charterparty, the defendants were entitled to the delivery of their goods, in whosoever hands they were, at the place of delivery. In addition to the sums paid on account of freight to the plaintiff, the defendants claimed to deduct the amount of the advances made to the master of *The Planter*; and, on this action being brought, they paid the amount of the balance into Court. I am of opinion that the plaintiff could have no

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lien beyond that amount, and, consequently, that the plaintiff is not entitled to retain his verdict on the ground of lien. I am of opinion, therefore, that the rule should be made absolute.

(WIGHTMAN J. was absent.)

HILL J. I am of the same opinion. My Lord has entered so fully into all the points that I do not feel it necessary to add anything.

(BLACKBURN J. was absent.)

Rule absolute.

Tuesday,
November 20th.

MYERS against SABL and others.

Plaintiff, a builder, by deed contracted with defendants to build for them a house and premises for a certain sum. The deed provided that "no alterations or additions

ACTION to recover an alleged balance due from defendants to plaintiff on a building contract.

At the *London* Sittings, after *Trinity* Term, 1858, the case was referred, by consent and by order of Nisi Prius, to an arbitrator, who was empowered to state a case for the opinion of the Court. The arbitrator, on 6th *June*, 1860, made his award in favour of the plain-

shall be admitted unless directed by the architect of" defendants "in writing under his hand, and a weekly account of the work done thereunder shall be delivered to the said architect or the clerk of the works on every *Monday* next ensuing the performance of such work; and the delivery of such account shall be a condition precedent to the right of" plaintiff "to recover payment for any such addition or alteration."

In an action by plaintiff to recover the balance due under the contract, the claim including charges for additions and alterations: Held, first, that parol evidence was admissible for plaintiff to explain that the expression "weekly account" was a term of art well known in the building trade, and meant, by the usage of the trade, an account of the day work expended in each week on the additions and alterations, and the materials used in such day work. Secondly, that mere sketches of the manner in which the extra work was to be done, prepared and furnished to plaintiff by defendants' architect, but not signed by him, were not directions in writing under the hand of the architect, within the meaning of the contract.

tiff for a certain sum; subject to the opinion of the Court on the following case.

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The plaintiff was a builder; and by a deed dated 18th October, 1856, and executed by him and the defendants, he contracted and agreed with the defendants to erect and build for them a house and premises for the sum of 8697*l.*, upon the terms and subject to the stipulations and conditions contained in the said deed, a copy of which was annexed to and was to be considered as part of the case. The house and premises were built by the plaintiff, and certain extra works and fittings were done and provided by him in and about the same; and the action was brought to recover the sum of 3783*l.* 4*s.* 3*d.*, being the balance claimed to be due on the contract and the value of such extra works and fittings, after giving credit to the defendants for all sums paid by them on account. By the contract it was provided that "no alterations or additions shall be admitted unless directed by the architect of" the defendants "in writing under his hand; and a weekly account of the work done thereunder shall be delivered to the said architect or the clerk of the works on every *Monday* next ensuing the performance of such work; and the delivery of such account shall be a condition precedent to the right of" the plaintiff "to recover payment for any such addition or alteration." It was contended before the arbitrator, on behalf of the defendants, that the plaintiff was not entitled to recover for some of the extra work done by him, on the ground that the same was not directed to be done by the architect by any writing under his hand pursuant to the clause in the contract above set out, and also on the ground that no sufficient weekly accounts of such work were delivered

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by the plaintiff within the meaning of that clause. With respect to the latter objection it appeared in evidence that certain accounts of the extra work were delivered by the plaintiff as and for weekly accounts within the meaning of the contract; and it was contended on his behalf that the term "weekly account," as used in the contract, was a term of art well known in the building trade and to all builders and architects, and that parol testimony was admissible to prove its meaning. The admissibility of such evidence was objected to on the part of the defendants. The arbitrator held that the words used were a term of art, and that such evidence was admissible: and he accordingly received the same, and was satisfied thereby that the weekly accounts delivered by the plaintiff of such extra work were sufficient weekly accounts within the meaning of the contract, and accordingly he included the value of such extra work in the amount awarded to the plaintiff. With respect to the objection that the plaintiff was not entitled to recover for part of the extra work, on the ground that the same was not directed to be done by the architect, by any writing under his hand pursuant to the contract, the arbitrator found and determined that, as regards the greater part of such extra work, the same was directed to be done by the architect by sufficient orders or directions in writing under his hand; but as regards a small part thereof, amounting to the sum of 105*l.* 18*s.* 5*d.*, the only evidence of any such orders or directions in writing produced before the arbitrator were certain sketches, indicating the manner in which such extra work was to be done, but not specifying the materials to be used, or containing any absolute order or direction for the execution of such works. The

sketches were all prepared in the office of the said architect of the defendants, by his clerks and under his directions, and were by his order furnished to the plaintiff, but were not signed by the said architect or his clerks. These sketches were annexed to the case. As regards them, the arbitrator held and adjudged that they were not sufficient orders or directions in writing within the meaning of the contract; and accordingly disallowed to the plaintiff the value of the work done under them.

The questions for the opinion of the Court were: First, was the arbitrator right in admitting parol testimony to shew the meaning of the term "weekly account," as used in the contract? If the Court should be of opinion that such evidence was inadmissible, the amount awarded to the plaintiff was to be reduced by a certain sum. Secondly, If the Court should be of opinion that the said sketches were sufficient written orders or directions for the execution of the works therein indicated, and that the arbitrator ought to have allowed to the plaintiff the value of such works, the amount awarded to the plaintiff was to be increased by the said sum of 105*l*. 18*s*. 5*d*.

Lush, in this Term, had obtained a rule calling on the plaintiff to shew cause why the case should not be remitted back to the arbitrator to be amended in the statement of facts raising the first point. It was ordered that this rule should come on for argument with the special case.

Specimens of the weekly accounts delivered by the plaintiff were attached to the affidavits on which this rule was obtained. These were each headed "Accounts of day work and materials." It was sworn that the plaintiff conceded, before the arbitrator, that these

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1860. accounts contained an account of only
MYERS portion of the additions and alterations a
v. contract, being confined to the day wo
SARL. each week on such additions and alte
materials used in such day work; that
contended that accounts of all the worl
have been delivered, according to the
language of the contract; and that the
tendered the evidence of architects and b
that the accounts delivered were suffici
was the custom, or common practice,
trade, to deliver accounts of such mat
said accounts contained, and that, in ref
works capable of being measured, it w
deliver any account of them; which
objected to by the defendants, but
arbitrator.

Bovill (Tompson Chitty with him)
First, there is no ground for sending
arbitrator. He was not required, b
state any points which might arise;
powered to state a case according t
he has set forth sufficient facts to

(The Court here stated that the
and that the rule must be discha

Secondly, the arbitrator was c
parol evidence to explain the
that being, as he has found, a t
trade. [*Blackburn J. Grant*
rity in your favour.]

Lush, contra. The case is not within the principles upon which parol evidence is admissible to explain written documents. The parol evidence, here, was not restricted to the meaning of an ambiguous word or expression, but was admitted to contradict the plain meaning of the words "a weekly account of the work done thereunder," i. e. under the direction of the architect, and to prove that those words were satisfied by the delivery of accounts of extra work not done under such direction. *Grant v. Maddox* (a) is distinguishable. Parol evidence was properly admitted, in that case, to shew that, by the word "year" in the contract there in question, the theatrical year was intended. [*Blackburn J.* Does not the principle of that decision shew that evidence is admissible to explain that, by a "weekly account of the work," an account of certain portions of weekly work was meant? *Alderson B.*'s judgment makes strongly against the present defendants. He says, "It is perfectly true that you have no right to qualify or alter the effect of a written contract by parol evidence; but it is perfectly competent to you to qualify or alter by parol evidence the meaning of the words which apparently form the written contract, and to insert the true words which the parties intended to use. That is not to alter the contract, but to shew what the contract is. Wherever the words used have, by usage or local custom, a peculiar meaning, that meaning may be shewn by parol evidence. Here the contract is, that the plaintiff is to be paid, for three years, a salary of 5*l.*, 6*l.*, and 7*l.* per week in those years. That means, according to the evidence and the finding of the jury, that she is to be paid so much per week during every week that the theatre

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(a) 15 *M. & W.* 737.

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is open in those years." You seek to read the words "a weekly account of the work done" as equivalent to "a weekly account of all the work done."] That is the fair meaning of the words, and it would be contradicted by the parol evidence. *Blackett v. Royal Exchange Assurance Company* (a) is in point. There, in an action on a policy on ship, in the common form, "upon the body, tackle, apparel, ordnance, munition, boat and other furniture of the ship called *The Thames*," it was held that parol evidence was inadmissible of a usage at *Lloyd's* that boats slung on the ship's quarter (which was proved to be the invariable mode of carrying them on such voyages as that insured) were not protected by the policy. In delivering the judgment of the Court Lord *Lyndhurst* C. B. said, "The policy is in the usual form as to ship and goods, and, as far as regards the ship, imports to be upon the ship (that is, the body), tackle, apparel, ordnance, munition, boat, and other furniture of the ship called *The Thames*. There is no exception, and the policy is, therefore, upon the face of it, upon the *whole* ship, on *all* her furniture, and on *all* her apparel. It was in evidence in the cause, and admitted upon the argument, that, upon such voyages as that insured, ships invariably carry a boat in the place in which this boat was carried, and slung as this boat was slung; and that the ship would not be properly furnished or equipped, unless it had a boat in that place and so slung. The objection, then, to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but

(a) 2 Cr. & J. 244.

was at direct variance with the words of the policy, and in plain opposition to the language it used. That, whereas the policy imported to be upon the ship, furniture, and apparel generally, the usage is to say that it is not upon all the furniture and apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." In the present contract "the work done" must mean "all the work done," just as, in that case, "boat" was held to include all the boats of the ship. In *Magee v. Atkinson* (a) it was held that the defendant, who had signed a contract in his own name, could not be allowed to shew that he had signed it only as a broker, although he was known to be so; and that parol evidence of a custom in *Liverpool*, where the contract was made, to send in brokers' notes without disclosing the principal's name, was properly rejected. [*Cockburn C. J.* There are two cases referred to in *Park on Marine Insurance*, vol. 1, pp. 23, 24 (ed. 8). In one of these, *Ross v. Thwaite* (b), Lord Mansfield C. J. was of opinion that evidence of the usage of underwriters was admissible to shew that goods lashed on deck are not within a general policy on goods; and that when such goods are intended to be insured they are always insured by name, and the premium is greater. In the other, *Backhouse v. Ripley* (c), Chambre J. ruled the same point.] Lord Lyndhurst C. B., in the judgment in *Blackett v. Royal Exchange Assurance Company* (d), distinguishes those cases, and shews that they proceeded

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(a) 2 M. & W. 440.

(b) Sittings at *Guildhall* after Hil. T. 16 G. 3.

(c) C. P., Sittings after Mich. T. 1802.

(d) 2 Cr. & J. 244. 250.

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upon a different principle, namely, that on an ordinary insurance on goods the underwriter is entitled to expect that they shall be stowed in the usual part of the ship; and that a usage that goods stowed in a more dangerous part are not covered by an ordinary policy, but require a distinct explanation to the underwriter of the nature of the risk, is not at variance with any part of the policy, but is a portion of the fairness which ought always to be observed in contracts. [*Blackburn J. Parke B.*, delivering the judgment of the Court in *Hutton v. Warren (a)*, says, "It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent."] The contract, here, is not silent on the matter with respect to which the parol evidence was tendered. In *Charlton v. Gibson (b)* *Cresswell J.*, at *Nisi prius*, refused parol evidence to explain the sense in which the word "building" was used in a written agreement for winning stone "for the purpose of building" certain cottages. Lastly, as to the second point stated by the arbitrator for the opinion of the Court, it is clear that the sketches in question were not such directions under the hand of the architect as were contemplated by the contract.

Tompson Chitty, in reply. Upon the first point, *Symonds v. Lloyd (c)* is a further authority in the plaintiff's favour. The plaintiff does not dispute the correctness of the arbitrator's determination on the second point. [*Cockburn C. J.* We are all agreed, as to the first point, that the parol evidence was properly

(a) 1 *M. & W.* 466, 475.(b) 1 *C. & K.* 541.(c) 6 *C. B. N. S.* 691.

admitted. The second point is too clear for argument, though it is a shabby defence to set up.]

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COCKBURN C. J. I am of opinion that the course pursued by the arbitrator was both proper and correct on point of law, and that the parol evidence was rightly received. The duty of the Court, or of an arbitrator who is in the place of the Court, is so to construe a contract as to give effect to the intention of the parties. Now, although parol evidence is not admissible to contradict a contract the terms of which have but one ordinary meaning and acceptance, yet if the parties have used terms which bear not only an ordinary meaning, but also one peculiar to the department of trade or business to which the contract relates, it is obvious that due effect would not be given to the intention, if the terms were interpreted according to their ordinary and not according to their peculiar signification. Therefore, whenever such a question has come before the Courts, it has always been held that where the terms of the contract under consideration have, besides their ordinary and popular sense, also a peculiar and scientific meaning, the parties who have drawn up the contract with reference to some particular department of trade or business, must have intended to use the words in the peculiar sense. This is but an application of the well known rule that the interpretation of contracts must be governed by the intention of the parties. And from the nature of the case, the peculiar meaning of the terms used can be discovered only by means of parol evidence. This is well explained by Mr. *Starkie* in his work on Evidence, vol. 3, p. 778 (ed. 3), who says: "Where terms are used which are known and understood by a particular class of

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persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of *applying* the instrument to its proper subject matter; and the case seems to fall within the same consideration as if the parties in framing their contract had made use of a foreign language, which the Courts are not bound to understand. Such an instrument is not on that account void; it is certain and definite for all legal purposes because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the Courts have long allowed mercantile instruments to be expounded according to the usage and custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters." I read that passage, not only because it has my entire approval, but because it has also had that of Lord *Wensleydale*, when a Judge of this Court, in his judgment in *Smith v. Wilson* (a). To apply that principle to the present case: the parties to the building contract before us have used the term "weekly account of work;" which expression has been shewn by parol evidence to have a peculiar signification in the building trade; to relate, not to all the work done, but to a particular portion of the work done, as to which such weekly accounts as have been rendered by the plaintiff are peculiarly necessary. Mr. *Lush* indeed says that, because the words have a plain general meaning, parol evidence is not admissible to explain them; and cites, as an authority for that contention, the case of *Blackett v. Royal Exchange Assurance Company* (b), in which Lord *Lyndhurst* C. B., delivering the

(a) 3 B. & Ad. 728. 733.

(b) 2 Cr. & J. 244.

judgment of the Court, held that a policy upon ship, covering boats by its general terms, could not be restricted in its operation by parol evidence of a usage at *Lloyd's* that boats slung on the ship's quarter were not protected by the insurance. I, of course, am bound by that case, so far as it goes; but I am not disposed to carry it any further, or to apply it to any circumstances not exactly similar. I think the case goes to the extreme verge of the law: for I am unable to see why the evidence was not admissible to shew that, by general understanding amongst insurers, the word "boats" did not mean all boats. However, the case need not bind us here. There is no reason why evidence of usage should not be admissible to shew that, in the building trade, weekly accounts are not rendered of all the work done, but of such portion only of the work as to which it is the practice of the trade to render such accounts. The cases to which I drew Mr. *Lush's* attention; the earlier cases in which it was held that goods stowed on deck might be shewn by parol evidence not to be covered by a policy on goods generally^(a); are immediately in point and applicable. Those cases have never been questioned since the first publication of *Park on Insurance*, and have been cited in all the subsequent text books on that subject. Yet the policies there in question were in general terms, and but for the evidence of usage could not have received a restricted and limited signification. There is no sound reason why, just as, in those cases, evidence was admitted to shew that by the goods intended to be insured were meant such goods only as were loaded in the ordinary stowage of the vessel, so, here, the general terms of the

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(a) See p. 313.

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contract which we are called upon to construe, may not receive a limited application by evidence of the general understanding amongst all persons in the trade to which the contract relates. I am therefore of opinion that such evidence was properly admitted by the arbitrator, and that no ground exists for disturbing the award.

(WIGHTMAN J. was absent.)

HILL J. I am entirely of the same opinion. The question turns upon the meaning to be given, in the contract, to the words "a weekly account of the work done thereunder." Mr. *Lush* says that the plain ordinary meaning of these words is a "weekly account of *all* the work done thereunder." The usage of the trade is proved to be that they mean "a weekly account of the day work done thereunder." We have to determine whether evidence of that usage was rightly received. Now the rule governing the admissibility of evidence to explain the language of contracts is, that words relating to the transactions of common life are to be taken in their plain, ordinary and popular meaning; but if a contract be made with reference to a subject-matter as to which particular words and expressions have by usage acquired a peculiar meaning different from their plain ordinary sense, the parties to such a contract, if they use those words or expressions, must be taken to have used them in their restricted and peculiar signification. And parol evidence is admissible of the usage which affixes that meaning to them. The admissibility of such evidence does not depend upon whether the expression to be construed is ambiguous or unambiguous;

but merely upon whether or not the expression has, with reference to the subject-matter of the contract, acquired the peculiar meaning.

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BLACKBURN J. I am of the same opinion. I agree with my brother *Hill* that the words of a written commercial contract are to be understood in the sense which they have acquired in the trade to which the contract relates. It is a *prima facie* presumption that, if the parties to such a contract use expressions which bear a peculiar meaning in the trade, they use them in that peculiar meaning; which can be ascertained only by parol evidence. I do not think that it is necessary, in order to render such evidence admissible, that there should be any ambiguity on the face of the phrase which has to be construed. In *Humfrey v. Dale* (a), where the question arose as to the admissibility of parol evidence to annex to a contract a customary incident, Lord *Campbell* C. J. said, "Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material. In either point of view, it will be admissible unless it labours under the objection of introducing something repugnant to or inconsistent with the tenor of the written instrument. And, upon consideration of the sense in which that objection must be understood with reference to this question, we think it does not. In a certain sense every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it." The rule is still more correctly laid down in *Smith's Leading Cases*, vol. 1, p. 529 (ed. 5), in the

(a) 7 E. & B. 266. 274.

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notes to *Wigglesworth v. Dallison*; where, after setting out *Parke B.*'s judgment in *Hutton v. Warren* (a), the author thus proceeds:—"From the above luminous judgment" "it may be collected that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they are silent." "But that such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and this inconsistency may be evinced, 1st, by the express terms of the written instrument. 2nd, by implication therefrom." That I take to be the true rule of law upon the subject; that when it is shewn that a term or phrase in a written contract bears a peculiar meaning in the trade or business to which the contract relates, that meaning is, *primâ facie*, to be attributed to it, unless, upon the construction of the whole contract, enough appears, either from express words or by necessary implication, to shew that the parties did not intend that meaning to prevail. The consequence is that every individual case must be decided on its own grounds, and upon the terms of the particular contract in dispute, regarded as a whole. In the cases of *Blackett v. Royal Exchange Assurance Company* (b) and *Spartali v. Benecke* (c) it will be found, I think, that the parol evidence was rejected on the ground that the language of the contract in each case, taken as a whole, evinced on the face of it an intention of the parties not to use the words in dispute in the restricted sense to which it was sought by the evidence to confine them. Neither of those cases

(a) 1 M. & W. 466. 474.

(b) 2 Cr. & J. 244.

(c) 10 C. B. 212.

conflicts with the general principle, which has been always admitted. In the present case, nothing appears on the face of the contract to lead to the conclusion that the parties did not intend to use the term "weekly account" in the peculiar sense which it bore in the building trade. On the contrary, the great probability is that both the plaintiff, as a builder, and the defendants' architect, intended to use it in that sense. Consequently, I think that the arbitrator was quite right in admitting the evidence.

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Judgment for plaintiff on the first point, and for defendants on the second.

CRAMPTON *against* WALKER.

Tuesday,
November 20th.

DECLARATION. For that, in consideration that plaintiff would accept, for defendant's accommodation, a bill of exchange drawn by defendant on plaintiff, and would deliver the same to defendant in order that he might negotiate it for his own use, defendant promised plaintiff to indemnify and save him harmless from any consequent loss or damage. Averment, that plaintiff accepted the bill and delivered it to defendant. Breach, that defendant did not indemnify or save harmless plaintiff from loss or damage; and plaintiff, as acceptor, was obliged to and did pay *W.*, the holder, the amount of the bill and interest, and the costs of an action on the bill by *W.* against plaintiff, as acceptor; and plaintiff also incurred costs and expenses in defending and settling such action.

Pleas. 1. To so much of the declaration as relates to plaintiff's claim in respect of his payment to *W.* of the amount of the bill and interest; A set-off.

Demurrer. Joinder in demurrer.

2. To so much of plaintiff's claim as relates to the costs of the action brought by *W.* against plaintiff, and the costs and expenses incurred by plaintiff in defending and settling the said action; That the whole of the said costs and expenses were incurred by plaintiff at defendant's request: concluding with a set-off.

Replication thereto. That the said costs and expenses were not, nor was any part thereof, incurred at defendant's request as alleged.

Demurrer. Joinder in demurrer.

Held, that the first plea was good, for that plaintiff's claim in respect of the amount of the bill and interest was a liquidated demand, capable of being ascertained with precision at the time of pleading; and was separable from the rest of the claim, though mixed up with it in one count. That the second plea was bad, being pleaded to a liquidated demand to which a set-off could be pleaded.

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dition, a bill of exchange drawn by defendant on plaintiff, requiring him to pay to defendant's order the sum of 100*l.*, three months after date, and would deliver the same to defendant, in order that he might negotiate the same for his own use, defendant promised plaintiff to indemnify and save harmless plaintiff from any loss or damage by reason thereof. Averment, that plaintiff accepted the said bill for defendant's accommodation, and delivered the same to him for the purpose and on the terms aforesaid. Breach, that defendant did not indemnify save harmless plaintiff from loss or damage by reason thereof; and plaintiff, as acceptor of the said bill, was obliged to and did pay to one *Lucas Waring*, the holder thereof the amount of the said bill, with interest thereon, and the costs of an action brought by the said *Lucas Waring* against plaintiff as such acceptor; and plaintiff also incurred costs and expenses in defending and settling the said action.

Pleas. 1. To so much of the declaration as relates to plaintiff's claim in respect of his payment to the said *Lucas Waring* of the amount of the said bill and the interest thereon; A set-off for money paid by defendant to the use of plaintiff at his request, and for money lent by defendant to plaintiff at his request, and for money had and received by plaintiff for defendant, and for money otherwise due from plaintiff to defendant.

Demurrer. Joinder in demurrer.
2. To so much of plaintiff's claim as relates to the of the action brought by the said *Lucas Waring* against plaintiff, and the costs and expenses incurred by plaintiff in defending and settling the said action: The whole of the said costs and expenses were incurred by plaintiff at the request of defendant; and the

time of the commencement of this suit plaintiff was and still is indebted to defendant in an amount equal to plaintiff's claim, in respect of a set-off similar to that pleaded in the first plea.

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Replication thereto. That the said costs and expenses were not, nor was any part thereof, incurred at the request of defendant as alleged.

Demurrer. Joinder in demurrer.

Welsby, for the plaintiff. First: the first plea is bad. The action being for unliquidated damages, a plea of set-off is inadmissible. Such a plea, pleaded to a declaration very similar to that in the present case, was held bad in *Hardcastle v. Netherwood* (a). It is true that the plea, there, was pleaded to the whole declaration, and that the Court said, "The defendant might, perhaps, have pleaded a set-off to that part of the count which charges the defendant with the amount of the acceptances paid by the plaintiff." There is, however, no distinction in principle between a plea to the whole and a plea to part of a declaration sounding in damages, and in which the breach is general. [*Hill J.* The part of the declaration to which the first plea is pleaded is in substance a special count for money paid. *Cockburn C. J.* The part of the demand answered by the plea is a sum certain, or, at any rate, capable of being ascertained at the time of pleading. The rule, therefore, laid down in *Welsby's Chitty's Statutes*, vol. 3, p. 1026, note (b), (2nd ed.) that "There cannot be a set-off against a claim merely sounding in damages, and which is not capable of being liquidated at the time of pleading," does not apply.

(a) 5 B. & Ald. 93.

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Hill J. That statement of the rule is fully borne out by the judgment of *Tindal C. J.* in *Morley v. Inglis* (a), one of the authorities cited in support of it.] The question is, whether the Statute of Set-off empowers a defendant to sever a claim which sounds in damages. [*Hill J.* Suppose that the defendant had paid this part of the plaintiff's claim before action; could he not have pleaded payment?] Probably not; the breach assigned in the declaration being, in effect, that the defendant failed to indemnify the plaintiff from the loss or damage incurred by the negotiation of the bill. But, assuming that payment might have been pleaded, it does not necessarily follow that a plea of set-off is admissible. Secondly: The replication to the second plea is good. That plea, however, is bad, as being pleaded to the unascertained costs of the action brought by *Waring*, including, possibly, costs incurred but not yet paid by the plaintiff. *Hardcastle v. Netherwood* (b) and *Auber v. Lewis* (c), there cited, are authorities against this plea also. [*Hill J.* *Garrard v. Cottrell* (d) shews that if the defendant requested the plaintiff to undertake the defence of *Waring's* action, the costs of it would be recoverable as money paid to the defendant's use. If so, they might also form the subject of a set-off.] Possibly they might, if the declaration was on the common counts; but here the count is special, and sounds in damages. Assuming, however, that the plea is good, the replication is also good. The request mentioned in the plea must mean an express request, the traverse of which by the replication is no departure from the decla-

(a) 4 B. N. C. 58. 70.

(b) 5 B. & Ald. 93.

(c) E. T. 1818, K. B. *Manning's Nisi Prius Digest*, 2nd ed. p. 251.

(d) 10 Q. B. 679.

ration, which proceeds upon the principle that an accommodation acceptor is entitled to recover from the party accommodated the necessary costs of defending an action on the bill, as damages for the breach of indemnity, apart from any request from the defendant ; *Jones v. Brooke* (a), *Stratton v. Mathews* (b).

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Garth, contra. The first plea is good. There is a substantial distinction between an action for the breach of a contract to indemnify and other actions sounding in damages only ; inasmuch as the damage arising from the failure to indemnify is the cause of action. The fact that damage has arisen from the breach is essential to the maintenance of the action ; a plea, therefore, to the damages stated in the declaration to have arisen is a good plea, just as non damnificatus would be. The damages may also be pleaded to separately ; otherwise the defendant would have no defence if he had before action satisfied the plaintiff part, or been released as to part of them. The amount of the bill and interest, to which the first plea is limited, might have been recovered by the plaintiff in an action for money paid for the defendant. A plea of payment of so much would have been a good answer to the plaintiff's claim for so much, in the declaration as actually framed ; it follows that the plea of set-off is equally valid. The defendant is not to be prejudiced in his defence to that which is a mere money demand because the plaintiff has inserted it in a special count. The dictum of the Court in *Hardcastle v. Netherwood* (c) is strongly in favour of the validity of the first plea. The judgment of *Tindal C. J.* in

(a) 4 Taunt. 464.

(b) 3 Exch. 48.

(c) 5 B. & Ald. 93.

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Hill J. That statement that the test whether ~~of~~ by the judgment is whether or not the amount one of the ~~to be set-off~~ is capable of being question is ~~determined~~ with precision at the time of defendant. *Hamilton v. Gould (b)* is a direct authority [Hill of the defendant's favour, as to the first plea. The plaintiff, as in this, sued as accommodation acceptor of a bill of exchange drawn by the defendant on him. The declaration contained a special count for not indemnifying the plaintiff from any loss or damage by reason of the acceptance; and averred that, in consequence of the defendant's neglect to pay the bill at maturity, the plaintiff was forced and obliged to pay the holder the amount, whereby the plaintiff was damnified to that amount, together with interest. The declaration also contained the usual money counts. The plaintiff's bill of particulars claimed only the amount of the bill and interest. The defendant pleaded the general issue, and gave notice of a set-off. At the trial, the plaintiff relied on the special count only, and the defendant's counsel, admitting his liability under that count, gave evidence of a set-off. The question whether a set-off was admissible was reserved, and the case was twice argued. It was held that the defendant's set-off should be allowed, as the plaintiff might have recovered under the money counts, and could not deprive the defendant of his set-off by declaring specially. In delivering the judgment of the Court *Bushe C. J.* said, "The first point reserved is, that this is not a case of mutual debts between the parties, the plaintiff's demand being for unliquidated damages. The question is, whether the plaintiff's claim be of such a nature; for,

(a) 4 B. N. C. 58.

(b) 1 Irish Law Rep. 171.

if so, the set-off cannot be sustained. The plaintiff, by his declaration, and also by his bill of particulars, only seeks to recover the amount of the bill of exchange and interest. This he might have recovered under the count for money paid for the defendant. *Seaver v. Seaver* (a). The plaintiff cannot be permitted, by introducing a special count, to defeat the defendant's right to set-off, *Birch v. Depeyster* (b); and here, the defendant's notice of set-off is to the whole declaration. The case of *Hardcastle v. Netherwood* (c) was relied upon by the plaintiff; but in that case, there was only a special count, and the plaintiff claimed charges and costs, which were unliquidated damages, and not a debt; and the Court intimated an opinion, that the defendant might have pleaded a set-off to so much of the count as charged him with the amount of the bill of exchange paid by the plaintiff. The case of *Hutchinson v. Reid* (d) is an authority that the defendant might have pleaded a set-off, if the action had not been brought before the two months expired for which the bill on which he relied as a set-off was drawn. We are of opinion that the set-off in this case must be allowed, because the plaintiff might have recovered under the money counts, and he cannot deprive the defendant of his set-off by pleading specially." Lastly, the second plea is good. *Garrard v. Cottrell* (e) shews that the costs of the action brought by *Waring* against the plaintiff would be recoverable by the plaintiff as money paid to the defendant's use, if that action was defended at the request, express or implied, of the defendant. It follows that a set-off can be pleaded to the plaintiff's claim in respect of those costs.

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(a) 6 C. & P. 673.

(b) 4 Campb. 385.

(c) 5 B. & Ald. 93.

(d) 3 Campb. 329.

(e) 10 Q. B. 679.

1860. [Hill J. The plea is pleaded to the costs incurred ; not
CRAMPTON to the costs paid.] It may be amended, if necessary, by
v. confining it to the costs paid. [Hill J. You cannot
WALKER. get over *Jones v. Brooke* (a) and *Stratton v. Mathews* (b).]

Welsby, in reply. The cause of action is substantially the breach of the promise to indemnify, and arises immediately upon the non-payment of the bill at maturity by the defendant. The consequences ensuing thereupon are mere damages, and the first plea is bad, as being pleaded to the damages.

COCKBURN C. J. I am of opinion that the first plea is good, and the defendant is entitled to judgment on the demurrer to that plea. If Mr. *Welsby's* argument was well founded, that, on the mere non-payment of the bill at maturity by the person for whose accommodation it was accepted, the cause of action at once arises for the breach of the contract to indemnify, and that all the consequences ensuing are merely damages flowing from that breach, no doubt it would follow that the damages claimed in the declaration could not be treated as separable, so as to admit of a plea of set-off to part of them. I think, however, that Mr. *Garth's* contention was sound and correct, that the cause of action arises only when loss or damage is sustained by the plaintiff, and that every fresh loss or damage is a fresh cause of action. If that be so, the defendant cannot be deprived of his right to plead a set-off to any part of the plaintiff's claim to which, if it stood alone, such a plea would be admissible, merely because the plaintiff has chosen to lump several claims together in one count. Suppose

(a) 4 Taunt. 464.

(b) 3 Ersk. 48.

that the plaintiff had had two causes of action arising out of the same subject-matter, and that as to one of them the defendant had offered the plaintiff a sum of money in satisfaction, which the plaintiff had accepted and had given a release; ought not the defendant to have been allowed to plead the release, however the plaintiff had mixed up the causes of action in the declaration? Or again, supposing that a plaintiff having two causes of action has entered into an accord and satisfaction with the defendant as to one, and that the defendant altogether denies his liability as to the other; ought not the defendant, in such a case, to be allowed to sever his pleas, pleading the accord and satisfaction as to the one cause of action, and traversing the other? I at first thought that *Hardcastle v. Netherwood* (a) was an authority against the defendant, and that it was a decision which had proceeded on more narrow and technical grounds than now prevail. But I find that it was based upon the very distinction which we are now taking. The plea of set-off was there pleaded to the whole of a declaration which contained but one count, founded partly on liquidated and partly on unliquidated demands; and was held bad on that account. But the Court expressed an opinion that the plea would have been admissible if confined to the liquidated demands. That distinction appears to me to be sound. Once it is seen that a declaration contains, mixed up in the same count, distinct causes of action, some for liquidated claims, others sounding only in damages; the defendant must be entitled to separate them and plead accordingly. As to the second plea, the objection pointed out by my Brother *Hill* is quite unanswerable. The plea is one

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of set-off to the costs of the action on the bill against him, incurred but not paid by the plaintiff. But it is quite clear that, assuming that the costs actually paid can be regarded as a liquidated demand, those merely incurred but not paid cannot be so considered.

(WIGHTMAN J. was absent.)

HILL J. I am of the same opinion. The main question arises upon the first plea, the second being virtually abandoned. And the question is, whether the cause of action to which the first plea is pleaded constitutes a debt due from the defendant to the plaintiff, so as to admit of being answered by a plea of set-off, under the Statute of Set-off which allows the debt of one party to be set off against that of the other, where there are mutual debts between them. Upon this subject *Tindal* C. J., in his judgment in *Morley v. Inglis* (a), says, after citing the language of the Statute of Set-off, "I shall not undertake to say that the word *debt* is to be interpreted according to the strict sense which is necessary to the maintaining an action of debt, nor shall I go through the beadroll of authorities which have been referred to on that point. It seems to me that the rule by which we are to determine whether or not a demand can become the subject of a set-off, is by inquiring whether it sounds in damages; whether the demand is capable of being liquidated, or ascertained with precision at the time of pleading." And, a little further on, he suggests as a test for considering whether a plea of set-off is admissible to an action on an agreement, whether the agreement is such that *indebitatus assumpsit* would lie

(a) 4 B. N. C. 58. 71. 72.

upon it. In the present case the plaintiff, as accommodation acceptor, is suing the defendant, the accommodation drawer, on the usual implied undertaking to indemnify the plaintiff, who has been compelled to pay the bill to the holder; and the plaintiff says, in effect, I claim from you the amount which I have been compelled to pay in consequence of your implied request. Could he have maintained indebitatus assumpsit for money paid? Undoubtedly he could; so that his claim falls within the test suggested by *Tindal C. J.* It is, however, said on his behalf that, because this his claim forms part only of but one cause of action contained in one and the same count of the declaration, the defendant cannot sever it and plead to it separately. But in *Hardcastle v. Netherwood* (a) the Judges, who felt compelled to disallow a plea of set-off pleaded to the whole of a count similar to the present, distinctly threw out that the plea might have been supported had it been confined to the liquidated part of the demand. That expression of opinion would alone be sufficient to dispose of the plaintiff's objection to the present plea; but, in addition to it, there is the case of *Hamilton v. Goold* (b), the decision in which is directly applicable in the defendant's favour. Mr. *Welsby* contends that the plaintiff can avoid a plea of set-off by declaring on a special count. The *Irish* Judges, however, advert to that point, and refer to *Birch v. Depeyster* (c), in which *Gibbs C. J.* said, "I am of opinion that the defendant is entitled to the set-off which he claims. The sums which the plaintiffs seek to recover might have been recovered as money had and received to their use. Therefore they shall

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(a) 3 B. & Ald. 93.

(b) 1 *Irish Law Rep.* 171.(c) 4 *Campb.* 385.

1860. not deprive the defendant of his set-off by declaring specially, and assigning a breach for not accounting.”
 CRAMPTON v. WALKER. And it is certainly consonant with justice that a plaintiff should not be allowed, by declaring in a special form, to oust the defendant from a good and legitimate ground of defence.

Judgment for defendant on the demurrer to the first plea ; for plaintiff on the demurrer to the replication to the second plea.

Thursday,
November 22d.

THOMPSON and others *against* The NORTH
EASTERN Railway Company.

[Reported, in the Queen's Bench and in the Exchequer Chamber on error from that Court, 2 B. & S. 106.]

Friday,
November 23rd.

The QUEEN *against* HOWES.

As a general rule, the father of a female child under the age of sixteen is legally entitled to her custody ; and she is not of an age to exercise a

A HABEAS corpus had issued, commanding the defendant to bring up the body of *Charlotte Barford*, a girl under the age of sixteen.

The defendant now brought the girl into Court, in obedience to the writ.

discretion to withdraw herself therefrom. Persons detaining such a child from her father's protection, though with her consent, will therefore be ordered by this Court, on proceedings by habeas corpus, to give her up to her father.

Sleigh moved that she should be delivered up to her father, at whose instance the habeas corpus had issued (a).

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The father is the proper person to have the custody of his child; who is not of an age of discretion sufficient to entitle her to exercise a choice, and absent herself from his protection. At the time when stat. 12 *Car.* 2. c. 24. was passed, parents were entitled to the custody of their children up to the age of twenty-one: and that Act, by sect. 8, empowered the father of any unmarried child under that age to dispose, by deed or will, of its custody while under that age. Stat. 4 & 5 *P. & M.* c. 8. s. 3. made it an offence, punishable by fine or imprisonment, to take any maid or woman child unmarried, being within the age of sixteen years, out of or from the possession and against the will of the father or mother of such child; and stat. 9 *G.* 4. c. 31., which repeals that Act, by sect. 20 re-enacts the offence. It was held by the Court for Crown Cases Reserved, in *Regina v. Mantelov* (b), that a man is guilty of the misdemeanour created by this section, who induces a girl, under the age of sixteen, to go away with him voluntarily, and leave her father's protection. [*Hill J.* That case shews that the law does not consider that a girl under that age has any discretion to exercise a choice.] That is so. And the legal custody of a legitimate child, too young to exercise a discretion, is that of the father; *Rex v. Greenhill* (c). *Regina v. Clarke* (d) shews that the guardianship for nurture of a child continues till the

(a) Before hearing the argument, the Judges had an interview with the girl in their private room.

(b) 1 *Dears. C. C. R.* 157.

(c) 4 *A. & E.* 624.

(d) 7 *E. & B.* 187.

1860. child attains the age of fourteen, up to which time the guardian for nurture is absolutely entitled to the custody of the child. In the present case, although the child is between fifteen and sixteen, she is, according to the authorities, still too young to exercise a discretion to leave her father.

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Digby Seymour, contra. The Court will not order this girl to be given up to her father if it appears that she is unwilling to return to him. Stat. 12 Car. 2. c. 24. s. 8. applies only in a case where a father has executed a deed or will relating to the custody of his infant child; and stat. 9 G. 4. c. 31. s. 20. is directed against unlawful abductions only. As a general rule, the right of a father to the custody of his child ceases when the child attains the age of fourteen. In *Bac. Abr.* tit. *Guardian* (E), it is laid down that "The authority of a guardian in socage ceases at the age of fourteen, at which age the infant may call his guardian to an account, and may choose a new guardian." [*Cockburn C. J.* That may be so, with reference to guardianship in socage, which is of an artificial character: but can it apply to the patria potestas? *Blackburn J.* In a note to *Ratcliff's Case* (a) it is said: "The direct object of stat. 4 & 5 P. & M. was to prevent the taking away or marrying maidens under sixteen, against the consent of their parents; but the statute prohibited it in terms which implied, that the custody and education of such females should belong to the father and mother, or the person appointed by the former."] The judgment of the Court in *Regina v. Clarke* (b), delivered by Lord

(a) 3 Rep., 38 a, b. Note (F) at vol. 2, p. 105, of *Thomas and Fraser's* edition.

(b) 7 E. & B. 196, 197.

Campbell C. J., appears to fix fourteen as the age at which a child reaches years of discretion. He says: "It is unnecessary to travel through the cases seriatim, as they are all reviewed in *Rex v. Greenhill (a)*, where the Court laid down the rule that, where a young person under twenty-one years of age is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves the infant to elect where he will go, but, if he be not of that age, the Court must make an order for his being placed in the proper custody. Lord Denman, *Littledale J.*, *Williams J.* and *Coleridge J.* all make age the criterion, and not mental capacity, to be ascertained by examination. They certainly do not expressly specify the age: but they cannot refer to seven as the criterion; and there is no intervening age marking the rights or responsibility of an infant till fourteen, when guardianship for nurture ceases, upon the supposition that the infant has now reached the years of discretion." [*Cockburn C. J.* Further on in that judgment (b), a letter of *Patteson J.* to Sir *Erskine Perry*, when Chief Justice of *Bombay*, is cited, in which, referring to an order of Sir *Erskine Perry's* Court for the delivery up of a *Hindoo* boy of twelve years of age, who professed to have embraced Christianity, to his father who adhered to the *Hindoo* religion, the writer says, "I cannot doubt that you were quite right in holding that the father was entitled to the custody of his child, and enforcing it by writ of habeas corpus. The general law is clearly so, and even after the age of fourteen." It is not the age of nurture, but the age of discretion which limits the paternal authority.

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(a) 4 A. & E. 624.

(b) At p. 199.

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Regina v. Manktelow (a) shews that, were we to decide that this girl may follow her own inclinations and refuse to go back to her father, the defendant might nevertheless be convicted for her unlawful abduction. But his conviction would rest on the ground that she is not of age to give consent to her removal from her father's protection.]

COCKBURN C. J. Those who resist this application for the interference of the Court in order to the delivery up of this girl to her father, have made out no case whatever to shew that he, though by law entitled to her custody, is not so entitled upon the facts. The question before us is purely one of law, whether a father is entitled to the custody of a child between the age of fifteen and sixteen, notwithstanding that the child desires not to be in his custody; as I fear that the girl before us, without any adequate or justifying motive, does. If we can save her from the mischiefs to which such a course on her part, if uncontrolled, would very probably lead her, we shall be most anxious to do so. Now the cases which have been decided on this subject shew that, although a father is entitled to the custody of his children till they attain the age of twenty-one, this Court will not grant a habeas corpus to hand a child which is below that age over to its father, provided that it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests. The whole question is, what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can

(a) 1 Dears. C. C. R. 157.

hasten the period which appears to have been fixed by statute for the arrival of the age of discretion ; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The Legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue ; and short of which such a child has no discretion to consent to leaving him. And it is clearly most desirable that, at least up to that age, no encouragement should be given to girls to withdraw themselves from the paternal care. I may add that if those persons, who have tried their best to baffle the authority of this Court, and to keep this girl back from her father, had been indicted for the offence of abducting her, it appears to me that they would have been liable to conviction. I wish to say, also, that we have not arrived at our conclusion without great consideration, and that we have consulted with the Judges of the other Courts, who are entirely of the same opinion with us. We must order that the girl be given up to her father.

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(WIGHTMAN J. was absent.)

HILL and BLACKBURN Js. concurred.

Ordered accordingly.

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Friday,
November 23rd.
Saturday,
November 24th.

In the matter of WILLIAM HENRY CRAVEN ALLEN.

By the 131st of the Articles of War drawn up in pursuance of The Mutiny Act for 1857, 20 Vict. c. 13. s. 1., jurisdiction was conferred on general Courts-martial in India to try and sentence certain military offenders

S*H**E**E* Serjt., in this term, had obtained a rule, on behalf of *William Henry Craven Allen*, calling on His Royal Highness the Duke of Cambridge, the General Commanding in Chief, and the keeper of the Queen's Prison, to shew cause why a writ of habeas corpus ad subjiciendum should not issue, directed to the keeper of the Queen's Prison, to bring up the body of the said *W. H. C. Allen*, then in the custody of the said keeper.

accused there of civil offences. By sect. 38 of that Act, the place of imprisonment under the sentences of general Courts-martial is to be appointed by the officer commanding the district. By sect. 40, every governor or keeper of any public prison in any part of Her Majesty's dominions is required to receive into and keep in his custody any military offender under sentence of imprisonment by a Court-martial, upon delivery to him of an order in writing in that behalf from the officer commanding the regiment to which the offender belongs, containing certain specified particulars. By sect. 41, in the case of a prisoner undergoing imprisonment under the sentence of a Court-martial in any public prison other than the military prisons set apart by the authority of the Act, the officer commanding the district is empowered to give an order in writing, directing that the prisoner be delivered over to military custody, for the purpose of being removed to some other prison or place, there to undergo the remainder of his sentence.

A., a military offender amenable to the jurisdiction, was tried in *India*, under the above statute, by a general Court-martial, for a civil offence, of which the Court found him guilty, and for which they sentenced him to four years' imprisonment. The officer commanding the district in which he was tried appointed the Fort of *Agra* as the place of his imprisonment. It did not appear whether this fort was or was not a public prison, or was or was not a military prison set apart by the authority of the Act. It was, however, under military command. *A.* was imprisoned there for about nine months; at the end of which the same officer who had appointed it as the place of imprisonment gave an order in writing, directing that he should be removed therefrom to *England*, to undergo there the remainder of his sentence; but not mentioning any prison in *England* to which he was to be removed. *A.*, having been brought to *England* under this order, was there confined in several prisons in succession, and, ultimately, in the Queen's Prison; an order from the Commander-in-Chief of the army in *England*, directing the keeper of that prison to receive him into custody for the remainder of his sentence, being sent there with him.

Held, making absolute a rule for a habeas corpus obtained by *A.*, that *A.* was entitled to his discharge: for that his detention in custody, which could not be justified at common law, was not warranted by the Act in question; inasmuch as, assuming (a point which the Court did not determine) that the case fell within the provisions of the Act as to the removal of prisoners, no valid order for his detention in the Queen's Prison had been made under either sect. 40 or sect. 41.

It appeared, from the affidavits on which the rule was obtained, that the prisoner was a lieutenant of Her Majesty's 82nd Regiment of Foot, and had been, on 28th *February*, 1859, tried at a general Court-martial held at *Shahychanpore*, in the *East Indies*, and upwards of 120 miles from the Presidency of *Fort William*, on a charge of the murder of one *Bidassee*. The Court found him guilty of manslaughter only, and he was sentenced to be imprisoned for four years, without hard labour. The sentence of the Court-martial was confirmed by Lord *Clyde*, who was the officer commanding the district. He appointed *Agra Fort* (in the *East Indies*) as the place of imprisonment. In obedience to the sentence and to the appointment of Lord *Clyde*, Lieut. *Allen* was imprisoned at *Agra* until 26th *November*, 1859, upon which day he was removed to *Calcutta*, with an intimation that he was to be sent to *England*. He was confined in *Fort William* from 23rd *December*, 1859, until 30th *January*, 1860, when he embarked for *England*. He arrived in *England* on 20th *June*, 1860, and was confined for a few days at *Chatham*; from which place he was taken, on 26th *June*, to the convict prison at *Millbank*. On 16th *July* he was taken to the military prison at *Weedon*. On 24th *July* he was taken from *Weedon* to *Newgate*, where he was kept till 28th *July*, on which day he was taken to the Queen's Prison. The following letter from the Adjutant General was sent with him.

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"Immediate.

"*Horse Guards*. S. W. *July* 28, 1860.

"Sir,

"His Royal Highness the General Commanding in Chief desires me to inform you that he intends deliver-

1860. ing into your custody Lieut. *W. H. C. Allen*, late of the
 Re 82nd Foot; and I have the honour herewith to enclose
 ALLEN. his committal.

(Signed) "*J. Yorke Scarlett, A. G.*"

"The Governor of the Queen's Prison."

Inclosed was the following.

"Memorandum for the Governor of the Queen's
 Prison."

"You are hereby requested to receive into your custody, and to keep in confinement until the expiration of his imprisonment, Lieut. *W. H. C. Allen*, late of the 82nd Regiment of Foot; pursuant to a sentence of a general Court-martial held at *Shalychanpore*, in the *East Indies*. The date of signing the same was 28th *February*, 1859, and the date of the expiration of his imprisonment will be on the evening of 27th *February*, 1863."

[A statement of the charge and of the sentence here followed.]

"By order of His Royal Highness the General Commanding in Chief.

"*J. Yorke Scarlett, A. G.*"

It was agreed by both sides that, with the permission of the Court, the decision upon the argument of the rule should be final; and that a writ and return should be dispensed with.

Sir *W. Atherton*, Solicitor General, and *Welsby* now shewed cause (a). The question for the decision of the Court is, whether Lieut. *Allen* is now in lawful custody. By stat. 20 *Vict. c. 13. s. 1.*, The Mutiny Act which was in force in *India* at the time of Lieut. *Allen's* trial,

(a) *Friday, November 23rd.*

(a provision embodied in the subsequent Mutiny Acts), power is given to Her Majesty "to make Articles of War for the better government of Her Majesty's forces, which articles shall be judicially taken notice of by all Judges and in all Courts whatsoever." The 131st of the Articles of War, drawn up pursuant to this enactment, provided that "Any officer or soldier who" might "be serving in *India*, at a distance of upwards of 120 *English* miles from any of the Presidencies of *Fort William*, *Fort St. George* and *Bombay*," "or in the territories of any foreign state, or in any country under the government and protection of us, where there is no Court of civil jurisdiction in force, by our appointment, competent to try such offenders, who shall be accused of treason, or of any other civil offence, which, if committed in *England*, would be punishable by a Court of ordinary criminal jurisdiction and not by a Court-martial, shall be tried by a general Court-martial, appointed by the General or other officer having power to appoint Courts-martial in such places as aforesaid for the time being, and if found guilty shall be liable, in the case of an offence which, if committed in *England*, would be capital, to suffer death, or such other punishment as by the sentence of such general Court-martial shall be awarded; and in the case of any other offence to suffer such punishment other than death as by the sentence of such general Court-martial shall be awarded; no such punishment, nevertheless, to be of such a nature as shall be contrary to the usages of *English* law in regard to the punishment of offenders, or of that law as modified by laws applicable to *India*, or to be carried into effect until confirmed by the General or other officer by whom, or under whose authority, such Court-martial was appointed." The

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general Court-martial which tried Lieutenant *Allen* had, therefore, jurisdiction to try and convict him for the civil offence of which he was found guilty. He is now undergoing his sentence in a fitting prison in Her Majesty's dominions; and the Court will not go into the question whether any other prison situated elsewhere in those dominions would be fitter. The other side will probably rely on sect. 38 of The Mutiny Act before mentioned, 20 *Vict. c. 13.*, which enacts that "the place of imprisonment under the sentences of general Courts-martial shall be appointed by the officer commanding the district;" and will contend that no place other than that so appointed can be a proper place for the custody of the offender. In that view, *Agra*, the place of imprisonment for Lieut. *Allen* appointed by Lord *Clyde*, is the only place in which he can be lawfully confined. The view is, however, erroneous, and would lead to serious difficulties and inconveniences; as, for instance, in a case where the appointed prison became unavailable for the purpose, by being burnt down or otherwise destroyed. [*Cockburn C. J.* It may be that such a case is a *casus omissus*.] Sect. 39 empowers the Secretary-at-War to set apart buildings as military prisons, to be deemed public prisons under the Act; and to make rules and regulations for the government and superintendence thereof, and of the officials, and of the offenders confined therein. Sect. 40 enacts that "Every governor, provost-marshal, gaoler, or keeper of any public prison or of any gaol or house of correction in any part of Her Majesty's dominions, shall receive into his custody any military offender under sentence of imprisonment by a Court-martial, upon delivery to him of an order in writing in that behalf from the officer

commanding the regiment or corps to which the offender belongs or is attached, which order shall specify the period of imprisonment which the offender is to undergo, and the day and hour of the day on which he is to be released; and such governor, provost-marshal, gaoler, or keeper shall keep such offender in a proper place of confinement, with or without hard labour, and with or without solitary confinement, according to the sentence of the Court, and during the time specified in the said order, or until he be discharged or delivered over to military custody before the expiration of that time under an order duly made for that purpose." And by sect. 41, "In the case of a prisoner undergoing imprisonment under the sentence of a Court-martial in any public prison other than the military prisons set apart by the authority of this Act, or in any gaol or house of correction in any part of Her Majesty's dominions, it shall be lawful for the officer who confirmed the proceedings of the Court, or for the officer commanding the district," "to give as often as occasion may arise an order in writing directing that the prisoner be discharged, or be delivered over to military custody, whether for the purpose of being removed to some other prison or place, there to undergo the remainder or any part of his sentence, or for the purpose of being brought before a Court-martial either as a witness or for trial, and such prisoner shall, accordingly, on the production of such order, be discharged or delivered over, as the case may be." [Hill J. If you could shew an order in writing, by Lord Clyde, for the prisoner's removal from Agra to the Queen's Prison in this country, it may be that sect. 41 would make his detention here lawful. Blackburn J. It lies upon those who detain Lieut. Allen in custody

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in this country for an offence committed in another, to shew that they have strictly pursued some statutable authority, empowering them so to do.] If the Court sees that the prisoner has been convicted of a crime and ought now to be undergoing his sentence, they will not inquire into the propriety of the place of his custody. In the *Canadian Prisoners' Case* (a), the return to a writ of habeas corpus to bring up a prisoner in the custody of the gaoler at *Liverpool*, for the purpose of discharging him, stated that the prisoner was indicted for high treason in *Upper Canada*, and before his arraignment petitioned the Lieutenant-Governor, in accordance with a colonial Act (which authorized the pardon of persons indicted for high treason on condition of being transported from the province), confessing his guilt and praying for a pardon on such conditions as the governor and council should think fit; that the governor granted such pardon, on the condition, assented to by the prisoner, that he should be transported to *Van Dieman's Land* for life; that, in order to carry out such transportation, it was found necessary to remove the prisoner, first to *Quebec* and then to *England*; and that, on his arrival in *England*, he was delivered by the captain of the ship which brought him over into the custody of the gaoler of *Liverpool*, to be kept while means were preparing to transport him to *Van Dieman's Land*. The Court refused to discharge the prisoner; on the ground that, even if the condition of the pardon were not lawful, or if, being lawful, the prisoner was not an assenting party to it, he was still liable to be tried for the treason in *England*, and therefore any subject might

(a) 5 M. & W. 32.

detain him in custody until he was dealt with according to law. Lord *Abinger* C. B., in delivering the judgment of the Court, said (a), "The position of the prisoner appears to be this: that he has been indicted for high treason committed in *Canada* against Her Majesty; that he has confessed himself guilty of that treason; that he is liable to be tried for it in *England*; that he cannot plead the pardon which he has renounced; and that he is now in the custody of the gaoler of *Liverpool*, under such circumstances as would justify any subject of the Crown of *England* in taking and detaining him in custody until he be dealt with according to law. Any subject who held him in custody with a knowledge of the circumstances would be guilty of a crime in aiding and assisting his escape, if he be permitted to go at large without lawful authority. How then can we order the gaoler of *Liverpool*, or any other person who has him in custody, with knowledge of these circumstances, to let him go at large?" That case is an authority for the general proposition, that a prisoner lawfully in custody is not entitled to his discharge on habeas corpus. [*Blackburn* J. That case proceeded on the special ground that the prisoner, being guilty of high treason and liable to be tried for it in *England*, might be detained there by any subject of the Crown.] In the present case the prisoner has been already convicted and sentenced by a Court of competent jurisdiction; and the original designation of the place of imprisonment was merely directory, and formed no part of the sentence, which may be carried out in any lawful prison. Sect. 38 of the Act speaks of the sentence of the Court-martial, and of the

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(a) 5 M. & W. 50.

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place of imprisonment under the sentence, in separate clauses. The Court pronounces the sentence ; the place of imprisonment is subsequently appointed by the officer commanding the district. [*Cockburn* C. J. Sect. 41 appears to require an order in writing by the commanding officer, in order to warrant a change of the place of imprisonment.] It is doubtful whether that section applies, where the prisoner is originally confined in military custody.

Shee Serjt. and *J. Brown*, contra, were not now called upon (a).

COCKBURN C. J. I entertain no doubt that, upon the state of facts brought before us, the imprisonment of Lieut. *Allen* is illegal, and he is entitled to his discharge. Considering the nature of his offence, we may regret that any technical error in carrying out the sentence should have intervened, and that he should thereby be entitled to liberation before the sentence has expired. We have, however, to inquire whether the imprisonment which he is now undergoing is in point of law justifiable. I am clearly of opinion that it is not. He was tried for an offence which would have been cognizable only by the constituted civil tribunals, were it not for the special provisions of The Mutiny Act, and of the Articles of War incorporated therewith. These provisions empower a general Court-martial to try military persons accused of criminal offences ; to find an accused person guilty ; and to pass upon him sentence of imprisonment : but they do not empower the Court to appoint the

(a) *Shee* Serjt. was heard on the following morning. See post, p. 349.

place of imprisonment under the sentence. That power is given to the officer commanding the district. In the present case that officer, Lord *Clyde*, named *Agra*, in the *East Indies*, as the place of imprisonment; but we find that Lieut. *Allen* is now undergoing imprisonment, not there, but in this country. Such imprisonment is not in conformity with the mode in which his sentence is directed by the Act to be carried out. Then, has the change of the place of imprisonment been ordered by any one having authority under the Act so to order: for, if not, the change is contrary to common law and cannot be upheld? Now the only power to change the place of imprisonment, conferred by the Act, is that given by sect. 41 to the commanding officer of the district; the same person who, by sect. 38, is to appoint the place of imprisonment in the first instance. There is nothing before us at present to shew that Lord *Clyde*, the officer commanding the district, has exercised the power given him by sect. 41; but unless he has done so the prisoner is entitled to his discharge. If, then, the Solicitor General can obtain any further information, sufficient to satisfy us that Lord *Clyde* has ordered the place of the prisoner's imprisonment to be changed from *Agra* to *England*, the Court will pause before ordering the liberation of the prisoner; but if no such information is forthcoming, the prisoner must be discharged. In the meanwhile our present judgment is not final.

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(WIGHTMAN J. was absent.)

HILL and BLACKBURN Js. concurred.

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place of imprisonment under the *Solicitor General* said clauses. The Court pronounced on of the Court, he of imprisonment is subsequently made, the result of which commanding the district following affidavit, made by appears to require an order of the War department. "I have seen the commanding officer, in order to copy of a letter dated 'November 1859,' addressed to Lord Clyde, who is now in England, applies, where *Charles Yorke*, the then military secretary to His Royal Highness the Commander in Chief, has been directed by his lordship to take steps for sending Lieutenant *W. H. C. Allen* to England, if his lordship should consider that course advisable. I have seen and conversed with General Lord Clyde (b), who is now in England, on the subject of the said letter of 23rd September, 1859; and he has informed me that, after consulting with the Governor General of India, he directed the Adjutant General of the Forces to issue an order addressed to the commanding officer of the fort at Agra, for the removal of *W. H. C. Allen* from that place to Calcutta, for the purpose of being embarked for England with a party of invalids in charge of the officer commanding the detachment. General Lord Clyde further informed me that the Adjutant General was the proper officer to sign such an order, upon receiving his, Lord Clyde's, directions so to do; and that his lordship believes that it was in pursuance of such an order by the Adjutant General of the Forces that the said *W. H. C. Allen* was removed from the fort at Agra to England; as the commanding officer of the fort at Agra

(a) Saturday, November 24th.

(b) The *Solicitor General* stated that this conversation took place on the preceding evening, Friday, November 23rd.

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C. Allen to be removed, without the

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retained by the commanding officer of the

Agra, as his authority and justification for the

course he had taken; and after diligent inquiry I have

been, and am, unable to discover the existence of any

such order in this country, and I verily believe that

none such can be forthcoming."

Shee Serjt. was then heard in support of the rule,

(*J. Brown*, who was with him, was not called upon).

First, supposing the hearsay evidence, contained in the

affidavit just read, to be true in fact, the alleged order

of the Adjutant General was not the order of Lord

Clyde, who alone was empowered, by sect. 41 of the

Act, to change Lieut. *Allen's* place of imprisonment.

[*Esq. J. A* written order by the Adjutant General,

made under Lord *Clyde's* direction, would satisfy the

Act. *Blackburn J.* The Act does not require the

order to be under the hand of the officer commanding

the district.] Assuming that to be so, an order to

remove a prisoner to *England* was not warranted by the

41st section. It would require clear and express words,

not to be found in that section, to give so arbitrary a

power of removal to the military authorities; especially

in the case of prisoners guilty of minor offences. The

jurisdiction of the Court-martial to try persons accused

of civil offences at all is exceptional, and the creature of

the statute, coupled with the articles of war; nor is it to

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On the day following (a), the *Solicitor General* said that, in consequence of the suggestion of the Court, he had caused inquiries to be made, the result of which had been embodied in the following affidavit, made by the assistant solicitor to the War department. "I have seen and perused the copy of a letter dated ' Horse Guards, 23rd September, 1859,' addressed to Lord Clyde by Sir Charles Yorke, the then military secretary to His Royal Highness the Commander in Chief, directing his lordship to take steps for sending Lieut. W. H. C. Allen to England, if his lordship should consider that course advisable. I have seen and conversed with General Lord Clyde (b), who is now in England, on the subject of the said letter of 23rd September, 1859; and he has informed me that, after consulting with the Governor General of India, he directed the Adjutant General of the Forces to issue an order addressed to the commanding officer of the fort at Agra, for the removal of W. H. C. Allen from that place to Calcutta, for the purpose of being embarked for England with a party of invalids in charge of the officer commanding the detachment. General Lord Clyde further informed me that the Adjutant General was the proper officer to sign such an order, upon receiving his, Lord Clyde's, directions so to do; and that his lordship believes that it was in pursuance of such an order by the Adjutant General of the Forces that the said W. H. C. Allen was removed from the fort at Agra to England; as the commanding officer of the fort at Agr

(a) Saturday, November 24th.

(b) The *Solicitor General* stated that this conversation took place the preceding evening, Friday, November 23rd.

would not, according to universal practice, have allowed the said *W. H. C. Allen* to be removed, without the production of such an order. The Adjutant General's duty is to issue orders in pursuance of directions given by the Commander in Chief, and such order, if made, I verily believe would, according to military practice, be kept and detained by the commanding officer of the fort at *Agra*, as his authority and justification for the course he had taken; and after diligent inquiry I have been, and am, unable to discover the existence of any such order in this country, and I verily believe that none such can be forthcoming."

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Shee Serjt. was then heard in support of the rule, (*J. Brown*, who was with him, was not called upon). First, supposing the hearsay evidence, contained in the affidavit just read, to be true in fact, the alleged order of the Adjutant General was not the order of Lord *Clyde*, who alone was empowered, by sect. 41 of the Act, to change Lieut. *Allen's* place of imprisonment. [*Hill J.* A written order by the Adjutant General, made under Lord *Clyde's* direction, would satisfy the Act. *Blackburn J.* The Act does not require the order to be under the hand of the officer commanding the district.] Assuming that to be so, an order to remove a prisoner to *England* was not warranted by the 41st section. It would require clear and express words, not to be found in that section, to give so arbitrary a power of removal to the military authorities; especially in the case of prisoners guilty of minor offences. The jurisdiction of the Court-martial to try persons accused of civil offences at all is exceptional, and the creature of the statute, coupled with the articles of war; nor is it to

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be extended beyond the plain words of the enactment. By sect. 24 the Legislature has guarded against the execution of a sentence of transportation or penal servitude, passed upon an offender by a Court-martial in *India*, without an order by a Judge of one of the supreme Courts of Judicature; and it cannot have contemplated that a military officer should, *mero motu*, have power to order the removal of a minor offender from *India* to any other part of the Queen's dominions. [*Hill J.* It would be a strange omission in the Act, if no power was given to some authority or other to change the place of imprisonment of a prisoner confined for a long term in *India*. *Cockburn C. J.* In cases in which sect. 41 does apply, it may be matter for serious consideration whether the power to change the place of imprisonment thereby given to the commanding officer must not be assumed to authorize a change only to some other place within that officer's military jurisdiction.] The power must be reasonably construed as subject to that limitation. But sect. 41 does not apply to the present case. This is apparent from a consideration of the preceding sections. Sect. 38 directs that the place of imprisonment under sentences of general Courts-martial shall be appointed by the officer commanding the district. By sect. 39 the Secretary at-War may set apart buildings as military prisons, which are to be deemed public prisons within the meaning of the Act. By sect. 40 every governor, provost-marshal, gaoler, or keeper of any public prison is required to receive into his custody any military offender under sentence of imprisonment by Court-martial, on delivery to him of a written order to that effect from the officer commanding the regiment to which the offender belongs. Then follows sect. 41, which, in terms, is restricted to the case

of a prisoner undergoing imprisonment under the sentence of a Court-martial in any public prison other than the military prisons set apart by the authority of the Act, or in any gaol or house of correction in any part of Her Majesty's dominions. It does not appear whether the fort of *Agra* is a military prison set apart by the authority of the Act, neither does it appear that it is a public prison. It is, however, a military prison, and therefore not, in any case, a prison for the removal of a prisoner from which an order may be made, under sect. 41, by the officer commanding the district; inasmuch as that order is to direct that the prisoner be delivered over to military custody. The section assumes, therefore, that he is, prior to the order, in civil custody. One object of the enactment, probably, was that if the regiment to which an offender in civil custody belonged, was about to be removed to another station, he might be handed over to the military authorities and removed with it. Moreover, it is not to be supposed that the section applies to the removal of a prisoner from one part of the Queen's dominions to another. Otherwise, the commanding officer might exercise his own caprice in the choice of the country of the fresh prison. [*Cockburn* C. J. The other side may contend that sect. 41 has that extensive operation, inasmuch as sect. 38 imposes no limits within which the prison, in which the prisoner is originally to be directed by the commanding officer to be confined, must be situate. Could not Lord *Clyde*, under sect. 38, have appointed, in the first instance, the Queen's Prison in *England* as the original place of confinement for Lieut. *Allen* ?] The Legislature can never have intended to empower an officer in the *East Indies* to call upon any gaoler in *England* to receive

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and keep a prisoner, tried and convicted in *India*. [*Cockburn C. J.* By sect. 40 the order to the keeper of a prison to receive a military offender convicted by Court martial is to be given by the officer commanding the regiment to which the offender belongs. There has been no such order in this case.] No; the only order, if any was that of the Adjutant General, by the direction of Lord *Clyde*. [*Atherton*, Solicitor General. The order was that of Lord *Clyde*, the officer commanding the district, and satisfied sect. 41. Lieut. *Allen*, having been removed under the order, is lawfully in *England*. [*Cockburn C. J.* The order is merely for the removal of the offender to *England*, not to any named prison in *England*. The order, if valid, would justify his imprisonment in any *English* prison.] [The Solicitor General. Conceding that the order was too wide, the Commander in Chief in *England* has supplied that deficiency, by designating the Queen's Prison as the place of imprisonment.] [*Cockburn C. J.* There is nothing in the Act to give the *English* Commander in Chief power to interfere.] [The Solicitor General. If the Court sees that an offender, who has been convicted of felony by a Court of competent jurisdiction, is in a proper place of custody for undergoing his sentence; they will not inquire whether the particular prison is the right one.] [*Blackburn J.* The Commander in Chief would appear to be the person to whom a power to remove a military prisoner from one prison to another might most properly be intrusted; but I cannot find that the Legislature has given him that power.]

Shee Serjt. In the absence of an express power to that effect, the proceedings of the Commander in Chief are a direct infringement of sect. 9 of the Habeas

Corpus Act, 31 *Car. 2. c. 2.*, which enacts, "That if any person or persons, subjects of this realm, shall be committed to any prison or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, that (a) the said person shall not be removed from the said prison and custody into the custody of any other officer or officers, unless it be by habeas corpus or some other legal right," and provides that persons making out a warrant for such removal, contrary to the Act, shall incur the pains and forfeitures mentioned in the Act. (He was then stopped.)

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COCKBURN C. J. We postponed our decision in this case, in order to give the Solicitor General an opportunity of procuring further affidavits. He has now brought under our notice an affidavit, the consideration of which satisfies me that it would be useless for us to postpone judgment any longer, or to enlarge the rule with a view to the further investigation of the facts; inasmuch as, assuming that the facts stated in the affidavit were fully established, I am of opinion that the rule must nevertheless be made absolute. It is unnecessary to determine the question which has been argued by my brother *Shee*, whether this case falls within the provisions of sect. 41 of The Mutiny Act of 1857. Even if it does so (and I am inclined to think that it does), those provisions have not been complied with, and, as the case now stands, no legal warrant exists by virtue of which the keeper of the Queen's Prison can hold Lieut. Allen in custody. Sects. 40 and 41 of the Act seem to be somewhat at variance. [His Lordship read them.] One section makes the order in writing of the officer

(a) *Sic.*

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#. commanding the regiment to which the offender belongs the condition upon which he is to be received and imprisoned by the keeper of a prison; by the other section, the like order of the officer commanding the district is the condition upon which a prisoner may be moved from one prison to another. The question might arise whether, even after the making of an order by the officer commanding the district, under the latter section, for the removal of a prisoner from one public prison to another, the keeper of the prison to which he is sent could be required to receive him without an additional order, under sect. 40, from the officer commanding his regiment. How this may be we need not now determine. It is enough to say that in the present case no order has been made, under either section, by virtue of which the keeper of the Queen's Prison can detain Lieut. *Allen* in custody. Assuming the truth of all the facts stated in the affidavit produced by the Solicitor General, all that has taken place is, that Lord *Clyde*, the commanding officer of the district, having first directed, under the 38th section, that the place of the offender's imprisonment should be *Agra*, afterwards directed the Adjutant General in *India* to make an order (which may be deemed for the present purpose to have been tantamount to an order by Lord *Clyde* himself) for the removal of the prisoner from *Agra* to *England*, with a view, no doubt, to his undergoing the remainder of his sentence in this country. It does not appear that any order has ever been made, either by Lord *Clyde* as the officer commanding the district, or by the officer commanding Lieut. *Allen's* regiment, for the imprisonment of Lieut. *Allen* in the Queen's Prison, or for his reception into custody by the keeper of that prison. The deficiency in this respect in Lord *Clyde's*

order has been attempted to be supplied by the direction given to the keeper of the Queen's Prison to receive the prisoner, by the *English* Adjutant General, representing His Royal Highness the General Commanding in Chief. But there is no provision in the Act to empower either His Royal Highness, or the Adjutant General for him, to give any such direction in cases like the present. The custody in which Lieut. *Allen* now is, is, therefore, unlawful, because no legal order or warrant for his detention in it can be produced. There is a material distinction between this case and that of *The Canadian Prisoners* (a), cited by the Solicitor General. There, the prisoner who applied for a habeas corpus was liable to be tried in this country for high treason, and if discharged from custody might have been immediately re-apprehended by any one: consequently, the Court refused to liberate him, although he was not in the custody in which he ought properly to have been. Here, the prisoner is in custody in this country without any lawful cause, undergoing an imprisonment which is unlawful because justified by no legal warrant, and from which he is absolutely entitled to be liberated.

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(WIGHTMAN J. was absent.)

HILL J. I am of the same opinion. Lord *Clyde*, as the officer commanding the district, complied with the 38th section of the Act by naming *Agra* as the place for Lieut. *Allen*'s imprisonment to undergo his sentence; and assuming, for the purposes of the case, that the case falls within the 41st section, and that it

(a) 5 M. & W. 32.

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was open to Lord *Clyde* to give a subsequent order in writing, directing the prisoner's removal to some other prison or place, there to undergo the remainder of his sentence, the only order which Lord *Clyde* has given was one for the prisoner's removal to *England*. The prisoner is now found in this country and in the Queen's prison ; and the question to be answered is, under what authority is he detained there in custody? The only warrant which can be produced is a document coming from the Horse Guards, signed by the Adjutant General, stating Lieut. *Allen*'s crime and sentence by an *Indian* Court-martial, and requiring the governor of the prison to keep him in confinement until his sentence expires. I find, however, no authority given by The Mutiny Act either to the Adjutant General or to the Commander in Chief, to issue such a document. The only section of The Mutiny Act, so far as I can discover, which authorizes a gaoler to receive into custody and keep in confinement a military offender under sentence of imprisonment by a Court-martial, is sect. 40, which requires him to do so upon delivery to him of an order in writing in that behalf from the officer commanding the regiment to which the offender belongs. In the present case no such order is forthcoming. I am therefore constrained, very unwillingly I confess, to say that Lieut. *Allen* is illegally in custody and is entitled to his discharge.

BLACKBURN J. I am of the same opinion. In *The Canadian Prisoners' Case* (a) circumstances appeared which shewed that the detention of the prisoner, who applied for a habeas corpus, might be justified at com-

(a) 5 M. & W. 32.

mon law. He had confessed himself guilty of high treason ; he had neither been tried nor pardoned ; he was liable to be tried for that crime in this country ; and any subject of the Crown might, at common law, detain him in custody. For those reasons the Court refused to discharge him. But, in the case before us, Lieut. *Allen* is detained in custody in this country under circumstances in which the common law would not detain him. The real reason for his detention is that he has been tried by a Court-martial in *India*, and there sentenced to four years' imprisonment. The common law does not authorize his detention for such a cause. Recourse must therefore be had to some statutable authority by those who seek to justify it. The Mutiny Act, although it authorizes the detention of a prisoner in many cases, is no authority in the case before us. I need not repeat what has been said by the Lord Chief Justice and my brother *Hill* upon this point. I will only say that, giving full credit to what Lord *Clyde* says he believes was done in *India*, namely, that an order for the prisoner's removal to *England* was sent by the Indian Adjutant General, by Lord *Clyde's* direction, to the commander of the fort at *Agra*, I agree with the rest of the Court, for the reasons they have stated, that the case is not thereby brought within any of the provisions of the statute, and consequently that Lieut. *Allen* cannot be detained in the Queen's Prison. It is a matter, however, for the serious consideration of the Government, whether they will not, for the future, revise The Mutiny Act, and make provision in it for a case like the present.

Rule absolute.

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Saturday,
November 24th.

COBBETT *against* WHEELER, JENKYNs and Others.

Stat. 4 Jac. 1.
c. 3. s. 2.
enacts, that
"In any ac-
tion" "of
trespass or
ejectione
firmæ, or any
other action
whatsoever,
wherein the
plaintiff"
"might have
costs (if in
case judgment
should be
given for him),"
if "the plain-
tiff" "after
appearance
of the de-
fendant" "be
non-suited,"
"the defendant" "shall have judgment to recover his costs against every such plain-
tiff."

THE plaintiff in person had in this Term obtained a rule calling on the defendants to shew cause why so much of the judgment signed in this action as related to the costs of the nonsuit and the execution issued thereunder should not be set aside, and why the plaintiff should not be discharged out of the custody of the keeper of the Queen's Prison as to this action.

The action was one of ejectment, brought by the plaintiff as executor of a deceased mortgagee, to recover certain toll-gates of a turnpike road in the county of *Southampton*. The defendants, other than *Jenkyns*, were toll-gate-keepers, and appeared to defend as tenants; *Jenkyns*

The General Turnpike Act, 3 G. 4. c. 126., by sect. 48 imposes a penalty upon a mortgagee of tolls who shall keep possession of the toll-gates and receive the tolls, after he has been satisfied the mortgage debt, with interest and costs. Sect. 74 directs that some one of the trustees of a turnpike road, or the clerk to such trustees, may be sued instead of the trustees; with a proviso that every such defendant shall be reimbursed, out of the turnpike funds, all such costs, charges and expenses as he shall be put to or become chargeable with or liable to, by reason of his being so made defendant.

Plaintiff, executor of a mortgagee of turnpike tolls, brought ejectment to recover the toll-gates; making the keepers of the toll-gates defendants to the writ. *J.*, a trustee of the road, thereupon obtained leave to defend as landlord. Plaintiff was nonsuited, and defendants signed judgment for their costs, and took plaintiff in execution on a *ca. sa.*

Held, discharging a rule obtained by plaintiff to set aside the judgment and execution, that defendants were entitled to their costs. That, assuming that stat. 4 Jac. 1. c. 3. s. 2. makes it a condition to a defendant's right to costs, when the plaintiff is nonsuited, that the plaintiff, if successful, would, in the particular action, have been entitled to costs, the case was within the statute; sect. 48 of stat. 3 G. 4. c. 126. implying that plaintiff, if successful, would have recovered his costs, even if *J.* would, by sect. 74, have been exempted from personal liability to pay them; and, *J.*'s co-defendants not being, in any view of the case, exempt from such liability.

Quære, whether stat. 4 Jac. 1. c. 3. s. 2. does not give costs to defendants, where plaintiffs are nonsuited, in all actions in which, in general, successful plaintiffs would be entitled to costs.

Quære, also, whether, had plaintiff succeeded, *J.* would have been exempted, by stat. 3 G. 4. c. 126. s. 74., from personal liability to pay plaintiff's costs.

afterwards obtained an order to defend as landlord; he being one of the trustees of the said turnpike road. At the trial, at the *Surrey Spring Assizes*, 1856, the plaintiff was nonsuited for want of evidence of title by the production of the mortgage deeds or otherwise. The defendants signed judgment in the usual way, on 26th *April*, 1856, and taxed their costs and issued a *ca. sa.*, on which the plaintiff was taken in execution on 11th *July*, 1856, and had remained in custody ever since.

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 v.
 WHEELER.

Lush now shewed cause. The plaintiff, in support of ~~the~~ rule, can rely only on the language of stat. 4 *Jac.* 1. c. 3. s. 2., which enacts that, "in any action, bill or plaint ~~of~~ trespass, or *ejectione firmæ*, or any other action whatsoever, wherein the plaintiff or demandant might have costs (if in case judgment should be given for him)," if "the plaintiff or plaintiffs, demandant or demandants, in any such action, bill or plaint, after appearance of the defendant or defendants, be nonsuited," "the defendant and defendants" "shall have judgment to recover his costs against every such plaintiff and plaintiffs, demandant and demandants." He must contend that this enactment does not entitle the present defendants to costs because the defendant *Jenkyns*, as a trustee of a turnpike road, would not have been personally liable to costs had judgment been given for the plaintiff. It is enacted, no doubt, by stat. 3 *G.* 4. c. 126. s. 74., "That the trustees" "of every turnpike road may" "be sued in the name" "of any one of such trustees" "or of their clerk" "for the time being:" "Provided always, that every such trustee" or "clerk" "shall be reimbursed and paid out of the monies belonging to the turnpike road for which he" "shall act, all such costs, charges and expenses as he"

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“shall be put unto, or become chargeable with, or liable to, by reason of his” “being” “made” “defendant.” That section, however, refers to actions brought against some one trustee, or the clerk of the trustees, of a turnpike road, as a nominal defendant representing the whole body of trustees; and does not apply to the present action, an ordinary action of ejectment, not brought in the first instance against *Jenkyns*, and to which he became a party only by his own act in obtaining leave to defend as landlord of the other defendants. [The plaintiff in person here referred to *Wormwell v. Hailstone (a)*.] In that case the defendant was the clerk to the trustees of a turnpike road, sued, as such, under stat. 3 G. 4. c. 126. s. 74.; and it was held that execution could not be levied upon his personal goods, because the effect of that enactment was to make him a nominal defendant only. The present is not an action of that description. Had *Jenkyns* not been let in to defend, the defendants originally sued would clearly have been liable to costs, notwithstanding the statute, if the plaintiff had recovered; and *Jenkyns*, after voluntarily coming in to defend, stood in no better position than they. Under the old practice he would have made himself liable to costs by entering into the consent rule; and by The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. ss. 185, 186, the costs of an ejectment follow the judgment (b). Even assuming, however, that the plaintiff, if successful, would have been deprived of costs as against *Jenkyns*, the defen-

(a) 6 Bing. 668.

(b) The case where both parties appear at the trial and the plaintiff is nonsuited, is not provided for by the Act; but rule 29 of the Pleading Rules, Hil. T. 1853, entitles the defendant in such a case to judgment for his costs.

dants are, nevertheless, now entitled to their costs as against the plaintiff. Stat. 4 *Jac.* 1. c. 3. s. 2. relates to the class of actions in which, in general, the plaintiffs would be entitled to recover costs; not to any particular action the individual plaintiff in which would be entitled to costs against the individual defendant. The Statute of *Gloucester* (6 *Ed.* 1. c. 1. s. 2.) having given costs to a successful demandant in ejectment, and stat. 23 *H.* 8. c. 15. having given a defendant costs upon the nonsuit of the plaintiff in actions of debt, trespass upon the case, detinue, account, &c., the object of the statute of *James* was to put on the same footing actions of trespass and actions of ejectione firmæ, and many other actions real and personal which, as the preamble to sect. 2 recites, were "within the same mischief as the said other actions were at the common law, and yet were omitted out of the provision of" stat. 23 *H.* 8. c. 15. Inasmuch, therefore, as ejectment is one of the class of actions in which, in general, a successful plaintiff is entitled to costs, the statute of *James* makes him liable to costs if unsuccessful. Stat. 3 *G.* 4. c. 126., by sects. 47 and 48, assumes the right of a mortgagee to recover the toll-gates in ejectment, and to keep possession of them and receive the tolls, until he shall have received the full sum due on his mortgage, with interest and costs; the latter section rendering him liable to a penalty if he retains such possession longer than is necessary for that purpose. There is nothing in the Act to restrict his right to costs in any case. The present plaintiff, therefore, who sues as the executor of a mortgagee, is a plaintiff who, within the plain meaning of stat. 4 *Jac.* 1. c. 3. s. 2., "might have" had "costs, if in case judgment should" have been "given for him." By stat. 7 & 8 *G.* 4. c. 24. s. 3. it is enacted that execu-

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tion shall not "issue against the goods and chattels of any trustee" of a turnpike-road, "by reason of his having acted as such trustee, or having signed or authorized or directed any contract or security to be entered into relating to any such road, unless in such contract or security such trustee shall have in express words rendered himself so personally liable." That enactment, however, cannot apply to the case of a trustee coming in voluntarily to defend an action of ejectment; and, even if it did, would not prevent a successful plaintiff from recovering his costs, though it would preclude him from enforcing his right to them against the individual trustee. (He was then stopped.)

The plaintiff, in person, contra. Stat. 4 Jac. 1. c. 3. s. 2. gives defendants costs against a nonsuited plaintiff only in cases where the plaintiff, had he succeeded, would have had costs against each particular defendant. And *Wormwell v. Hailstone* (a) shews that I should not, if successful, have been entitled to costs against the defendant *Jenkyns*.

COCKBURN C. J. I am of opinion that this rule must be discharged. The question is, whether the case falls within stat. 4 Jac. 1. c. 3. s. 2. And the first point is, whether the words of that enactment, "Any" "action whatsoever, wherein the plaintiff or demandant might have costs (if in case judgment should be given for him)," are meant to apply to the general class of actions in which a plaintiff, if successful, gets his costs; or to each particular action only, in which, under the particular circumstances of the case, the plaintiff would be entitled to costs. I think it is a very grave question whether Mr. *Lush's* is not the proper construction of the statute.

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But I will assume, for the purposes of the argument, that the plaintiff's is the true construction; and that it is a condition to the liability, under the statute, of a nonsuited plaintiff to pay costs, that the defendant in the particular action would have been liable to pay costs if defeated. The question then arises, whether immunity against costs would have been given to the present defendants, if defeated, by The General Turnpike Act, 3 G. 4. c. 126. s. 74.: upon which, and upon *Wormwell v. Hailstone* (a) decided under it, Mr. Cobbett relies. Had it been necessary in the present case to determine what is the effect of that enactment, I should have wished to review that decision; for, as at present advised, it appears to me that when the statute, after giving a right of action against a nominal defendant, as representing the trustees of a turnpike road, goes on to provide that such a defendant shall be reimbursed, out of the funds belonging to the road, all such costs, charges, and expenses as he shall be put to, or become chargeable with or liable to, by reason of his being made defendant, the effect is not to dispossess the adverse party, the plaintiff, of his right to execution against the defendant, but merely to give the latter, after payment of the damages and costs recovered against him, a right to compensation out of the corporate funds of the body which he has represented in the action. It is not, however, necessary to decide that question here. Making the further assumption, for the purposes of the argument, that *Wormwell v. Hailstone* (a) was rightly decided, we have still to consider the language of the statute of *James*. Making every assumption in favour of the plaintiff, the question comes back to this; whether the action

(a) 6 Bing. 668.

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is one in which he might have had costs if judgment had been given for him: for, if so, he, being nonsuited, is liable to costs under stat. 4 *Jac.* 1. c. 3. s. 2. Now it is clear that the plaintiff, had he succeeded in the action, might have had costs. Stat. 3 *G.* 4. c. 126. contains a special provision, in sect. 48, from which it is plain that the Legislature intended a mortgagee of tolls to recover, in ejectment, not his debt and interest only, but costs also; inasmuch as he is thereby rendered liable to a penalty only in case he keeps possession of the toll-gates and receives the tolls longer than is necessary to satisfy him his principal with interest and costs. The case, then, falls within stat. 4 *Jac.* 1. c. 3. s. 2., even if that statute is construed in the restricted sense of its applying to particular actions only, in which the individual plaintiff would, if successful, have been entitled to costs; for Mr. *Cobbett*, if successful, would have been so entitled under stat. 3 *G.* 4. c. 126. s. 48., and could have enforced his right by the specific mode of taking possession of the toll-gates and receiving the tolls. Another very serious difficulty stands in the plaintiff's way, which has hardly been sufficiently referred to; namely, that, in addition to *Jenkyns*, a trustee of the road, the keepers of the toll-gates are also defendants; and that there is no pretence for saying that they, at all events, would not have been liable to pay the plaintiff's costs, had he succeeded. Either stat. 3 *G.* 4. c. 126. s. 48. is an answer to the plaintiff's contention, or, if it is not, the fact that several of the defendants would have enjoyed no immunity from costs, if defeated in the action, is as complete an answer.

(WIGHTMAN J. was absent.)

HILL J. I am of the same opinion. The argument of the plaintiff is, that a plaintiff who is nonsuited is liable to costs only if the particular action be one in which he would, if successful, have recovered costs. Assuming (which I by no means admit) that that is the proper construction of the statute of *James*, the plaintiff must still fail; because, had he succeeded, he would have been entitled to recover both damages and costs.

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BLACKBURN J. concurred.

Rule discharged.

The HUNGERFORD MARKET Company *against* The
CITY STEAMBOAT Company (Limited).

Tuesday,
November 13th.
Monday,
November 26th.

THIS was an action brought for the recovery of tolls payable for and in respect of passengers embarked

A Company
empowered by
statute to take
tolls in return
for a public

service is not bound, independently of express enactment, to exact the same tolls from all persons alike; but is at liberty to remit the tolls, or any portion of them, to particular persons, at its pleasure and discretion.

Stat. 11 G. 4. c. lxx., by which plaintiffs, a market Company, were incorporated, by sect. 76 empowered them to take from the master of any steamboat "in respect of every passenger landing on or embarking from the wharf or causeway" authorized by the Act to be made, "the" "tolls" "which" should "at any time or from time to time be fixed and appointed by" plaintiffs, not exceeding 2d. for each passenger. A subsequent Act, 6 & 7 W. 4. c. cxxxiii., incorporating another Company for the purpose of building a bridge from plaintiffs' market over the *Thames*, by sect. 53 authorized plaintiffs to levy the same tolls for passengers landing on or embarking from the northern pier of the intended bridge which stat. 11 G. 4. c. lxx. s. 76. had empowered them to levy. And by sect. 125 it was enacted, that "the tolls to be taken by virtue of" the "Act should at all times be charged equally," and that every "reduction or advance of" them should "extend to all persons whatever using the said bridge."

Plaintiffs, after the bridge had been built, fixed and appointed the toll to be received "under the 76th clause of" their "Act of incorporation, from the master of every steamboat" "in respect of every passenger landing on or embarking from" the northern pier, at 2d. But by agreement with defendants, a steamboat Company, they charged defendants a toll of 1s. 4d. per 100 of their passengers; and, by agreement with another steamboat Company, charged that Company a lower toll of 1d. per dozen of their passengers. Passengers landing on or embarking from the northern pier from or on to steamboats used no other portion of the bridge than the northern pier, which abutted on plaintiffs' land.

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Plaintiffs having brought this action to recover from defendants arrears of toll for passengers at the rate agreed upon with defendants: held, that plaintiffs were entitled to recover the full amount. That stat. 11 G. 4. c. lxx. s. 76. was not an equality clause, requiring plaintiffs to charge the fixed and appointed toll in full for each passenger; but that it directed the toll to be fixed and appointed merely in order that the public might know the maximum toll they could be called upon to pay; leaving plaintiffs' right to lower or remit the toll, if it otherwise existed, wholly untouched.

That in the absence of an equality clause in that Act such right did exist, and was not abrogated by stat. 6 & 7 W. 4. c. cxxxiii. s. 125., that enactment applying only to tolls taken by the bridge Company for the use of the bridge, and not to the tolls taken by plaintiffs.

and disembarked from and on a float of the plaintiffs, attached to the northern pier of the *Charing Cross Bridge*, on to, and from steam vessels belonging to the defendants.

By consent, and by order of *Blackburn J.*, the following case was stated for the opinion of the Court, without pleadings.

The plaintiffs are *The Hungerford Market Company*, named in and incorporated by stat. 11 G. 4. c. lxx., a local Act, intituled "An Act to incorporate certain persons, to be called 'The *Hungerford Market Company*, for the re-establishment of a Market for the sale of fish, poultry, and meat, and other articles of general consumption and use, and for other purposes." In pursuance of that Act the plaintiffs erected and built the new market, market house, shops, wharfs, and other hereditaments thereby authorized to be made and erected. The plaintiffs also, pursuant to that Act, erected and made the wharf or causeway by that Act authorized to be so erected and made.

By the 76th section of that Act it is enacted, "That as soon as the said new market, market house, shops, wharfs, and other hereditaments, or any part of the same, shall be erected, made, and completed, it shall and may be lawful for the said Company and their successors to have, hold, and keep the said Market for the purposes aforesaid, from thenceforth for ever, upon every day in the year, (except *Sunday, Good Friday, and Christmas Day*,) and also by themselves, or any of their collectors, farmers, officers, or servants, to ask,

demand, recover, receive, and take of and from all and every persons and person exposing or offering for sale or selling any meat, fish, poultry, vegetables, fruit, or other provisions, or any hay, straw, malt, meal, grain, or other commodities whatsoever, or who shall rent, use, or hire any stall or standing place in any part of the said market, and also from all and every person and persons who shall embark or land from or upon the said wharfs any goods, wares, or merchandises, hay, straw, malt, meal, grain, meat, fish, poultry, vegetables, fruit, or other provisions or commodities, (except in respect of such last mentioned articles as shall be landed to be sold in the said market,) and also from the master of any steam and other passage boats and vessels in respect of every passenger landing on or embarking from the wharf or causeway by this Act authorized to be erected or made, the several rents, tolls, stallages, wharfages, or sums of money which shall at any time or from time to time be fixed and appointed by the said Company or their successors, or by their directors, to be paid for the same, according to but not exceeding the several rents, tolls, stallages, wharfages, or sum or sums of money mentioned and specified in the second and third schedules to this Act annexed; any charter, statute, usage, or custom to the contrary thereof in anywise notwithstanding."

The toll or sum mentioned and specified in the second schedule to the said Act annexed, as payable in respect of passengers landing on or embarking from the wharf or causeway, is thus described and stated therein, namely, "On steam and other passage boats and vessels, according to the number of passengers which shall land on or embark from the wharf or causeway, at and after

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the rate of and for each and every passenger, 2d. Which toll to be paid by the master of such vessel."

After the making of the said wharf or causeway, stat 6 & 7 W. 4. c. cxxxiii., a local Act, was passed, intituled "An Act for building a foot bridge over the river *Thames* from *Hungerford Market* in the parish of *Saint Martin in the Fields* in the county of *Middlesex* to the opposite shore in the parish of *Lambeth* in the county of *Surrey*, and for making suitable approaches thereto." Sect. 53 of that Act is as follows:—"And whereas under and by virtue of the Act incorporating the said *Hungerford Market Company*" (the plaintiffs "the said Company are authorized and empowered to receive certain tolls for or in respect of passengers and of baggage landing on or embarking from, or landed or or embarked from the wharf or causeway of the said market: And whereas it is in contemplation that the northern pier of the said intended bridge shall be and constitute a landing place for passengers, instead of and in addition to the said wharf or causeway; be it therefore enacted, that it shall and may be lawful for the said *Hungerford Market Company* to levy and receive, for and in respect of each passenger and all baggage embarking or disembarking from, or landed at or embarked from or on the said pier or landing place, or any float attached thereto, tolls of the same amount as the *Hungerford Market Company* are authorized to take by the said Act so incorporating the said *Hungerford Market Company* in respect of passengers embarking or disembarking, and of all baggage landed at or embarked from the said wharf or causeway, with such and the same rights, privileges, powers, authorities, and remedies as are now pos

essed or capable of being exercised by the said *Hungerford Market Company* in respect of the tolls now payable to them in respect of their said wharf or causeway, as if the said pier was part and parcel of the said wharf: **Provided** always, that nothing herein contained shall authorize or empower, or be deemed or construed to authorize and empower, the landing, embarking, or disembarking of any goods, wares, or merchandize, or articles of trade or business, at the aforesaid pier of the said intended bridge, without the special consent in writing of the said Suspension Foot Bridge Company."

The bridge authorized by that Act to be built has been so built, and is commonly called or known as the *Charing Cross Bridge*. The northern pier of the said bridge has, by means of a float attached thereto by the plaintiffs, been constituted a landing place for passengers embarking or disembarking from and on the said float.

The directors of *The Hungerford Market Company* (the plaintiffs), after the said pier had been made and float attached, namely, on 17th *May*, 1859, passed the following resolution: "Resolved, that the amount of toll to be demanded, received and recovered by this Company, under the 76th clause of their Act of incorporation, from the master of every steamboat and vessel, in respect of every passenger landing on or embarking from this Company's landing place, shall, on and after the 1st day of *June* next, be the sum of twopence; but that this resolution shall be subject to such modifications as may have been agreed on, or may hereafter be agreed upon, in any particular cases, between this Company and the owners or proprietors of steamboats or vessels." And the said directors accordingly fixed and appointed that toll to be paid and taken, as so resolved on.

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the rate of and for each and every
toll to be paid by the master

After the making of the
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Thames from
Saint Martin

to the opposite bank of the river, and at this rate the payments would amount
county of Middlesex, which is the last rate paid by the defendants
thereat, and at this rate the payments would amount
whenever about 4000l. a year. The fares charged by the defendants

to the passengers in their steamboats are very
low, being only 1d. or 2d., according to distance. The
claim for reduction in tolls, made by the defendants
from time to time, was based upon the reductions made
by them in their passengers' fares. It was also, some
years ago, agreed between the plaintiffs and *The London
and Westminster Steamboat Company*, who have always
paid the tolls to the plaintiffs for their passengers, that
the plaintiffs, instead of being paid 2d. for each pas-
senger embarked or disembarked from that Company's
steam vessels from and on the said float, should be paid
by the said Company no more than 1d. for each and
every dozen passengers embarked or disembarked from
the steam vessels of the said Company from and on the
said float. The rate of toll charged to the said Com-
pany has varied from 4s. 2d. per 100 passengers to 1
per dozen passengers, and this lower rate of toll has
been paid by that Company for their passengers, and
accepted by the plaintiffs throughout the period during
which the tolls claimed in this action were incurred.
The fare charged by *The London and Westminster Steam-
boat Company* to their passengers is uniformly 1d.,

between the plaintiffs

the plaintiffs should pay the

embarking from their

at; and the defendants

have paid the plaintiffs the

The rate of tolls charged by

by the defendants, has varied

100 passengers, to 1s. 4d. per 100

county, which is the last rate paid by the de-

thereat, and at this rate the payments would amount

whenever about 4000l. a year. The fares charged by the de-

endants to the passengers in their steamboats are very

low, being only 1d. or 2d., according to distance. The

claim for reduction in tolls, made by the defendants

from time to time, was based upon the reductions made

by them in their passengers' fares. It was also, some

years ago, agreed between the plaintiffs and *The London*

and *Westminster Steamboat Company*, who have always

paid the tolls to the plaintiffs for their passengers, that

the plaintiffs, instead of being paid 2d. for each pas-

senger embarked or disembarked from that Company's

steam vessels from and on the said float, should be paid

by the said Company no more than 1d. for each and

every dozen passengers embarked or disembarked from

the steam vessels of the said Company from and on the

said float. The rate of toll charged to the said Com-

pany has varied from 4s. 2d. per 100 passengers to 1

per dozen passengers, and this lower rate of toll has

been paid by that Company for their passengers, and

accepted by the plaintiffs throughout the period during

which the tolls claimed in this action were incurred.

The fare charged by *The London and Westminster Steam-*

boat Company to their passengers is uniformly 1d.,

be the distance traversed. The fare
 passengers by the boats of the defend-
 for which *The London and West-*
ny charge 1*d.*, is the same.

the tolls payable to the plaintiffs

Westminster Steamboat Company to

passengers, several thousands of passengers

embarked on and disembarked from the

defendants' steam vessels from and on the said float;

but, for the purposes of this case, it is agreed that the
 plaintiffs are proceeding in this action for the said toll
 of 1*s.* 4*d.* per 100, for and in respect of only 10,000 of
 them having so embarked and disembarked.

The defendants have refused to pay, and dispute their
 liability to pay, the said toll of 1*s.* 4*d.* per 100 passen-
 gen, on the ground that the plaintiffs are charging them
 a greater amount of toll than they charge the said
London and Westminster Steamboat Company; the
 plaintiffs so charging the defendants with the said toll
 of 1*s.* 4*d.* for each and every 100 passengers so em-
 barked and disembarked on and from the defendants'
 steam vessels, and charging the said *London and West-*
minster Steamboat Company with the said toll of 1*d.*,
 only, for each and every dozen passengers so embarked
 and disembarked on and from their steam vessels. The
 defendants dispute their liability to the said higher toll,
 under the provisions contained in the 125th section
 of stat. 6 & 7 W. 4. c. cxxxiii., which enacts as fol-
 lows.—“Provided always, and be it further enacted,
 that the tolls to be taken by virtue of this Act shall at
 all times be charged equally, and that no reduction or
 advance in the said tolls shall either directly or indirectly
 be made partially or in favour of any particular person

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Some years ago, it was agreed between the plaintiffs and the defendants, that the defendants should pay the tolls for all passengers landing or embarking from their steamboats on the plaintiffs' float; and the defendants have accordingly for several years paid the plaintiffs the tolls for such passengers. The rate of tolls charged by the plaintiffs, and paid by the defendants, has varied from 4s. 2d. per 100 passengers, to 1s. 4d. per 100 passengers, which is the last rate paid by the defendants; and at this rate the payments would amount to about 400l. a year. The fares charged by the defendants to the passengers in their steamboats are very low, being only 1d. or 2d., according to distance. The claim for reduction in tolls, made by the defendants from time to time, was based upon the reductions made by them in their passengers' fares. It was also, some years ago, agreed between the plaintiffs and *The London and Westminster Steamboat Company*, who have always paid the tolls to the plaintiffs for their passengers, that the plaintiffs, instead of being paid 2d. for each passenger embarked or disembarked from that Company's steam vessels from and on the said float, should be paid by the said Company no more than 1d. for each and every dozen passengers embarked or disembarked from the steam vessels of the said Company from and on the said float. The rate of toll charged to the said Company has varied from 4s. 2d. per 100 passengers to 1d. per dozen passengers, and this lower rate of toll has been paid by that Company for their passengers, and accepted by the plaintiffs throughout the period during which the tolls claimed in this action were incurred. The fare charged by *The London and Westminster Steamboat Company* to their passengers is uniformly 1d.,

whatever may be the distance traversed. The fare charged to the passengers by the boats of the defendants, for the distances for which *The London and Westminster Steamboat Company* charge 1*d.*, is the same.

Since the reduction of the tolls payable to the plaintiffs by *The London and Westminster Steamboat Company* to 1*d.* per dozen passengers, several thousands of passengers have been embarked on and disembarked from the defendants' steam vessels from and on the said float; but, for the purposes of this case, it is agreed that the plaintiffs are proceeding in this action for the said toll of 1*s.* 4*d.* per 100, for and in respect of only 10,000 of them having so embarked and disembarked.

The defendants have refused to pay, and dispute their liability to pay, the said toll of 1*s.* 4*d.* per 100 passengers, on the ground that the plaintiffs are charging them a greater amount of toll than they charge the said *London and Westminster Steamboat Company*; the plaintiffs so charging the defendants with the said toll of 1*s.* 4*d.* for each and every 100 passengers so embarked and disembarked on and from the defendants' steam vessels, and charging the said *London and Westminster Steamboat Company* with the said toll of 1*d.*, only, for each and every dozen passengers so embarked and disembarked on and from their steam vessels. The defendants dispute their liability to the said higher toll, under the provisions contained in the 125th section of stat. 6 & 7 W. 4. c. cxxxiii., which enacts as follows.—“Provided always, and be it further enacted, that the tolls to be taken by virtue of this Act shall at all times be charged equally, and that no reduction or advance in the said tolls shall either directly or indirectly be made partially or in favour of any particular person

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or Company, but every such reduction or advance of tolls shall extend to all persons whomsoever using the said bridge, anything to the contrary thereof in anywise notwithstanding." The plaintiffs contend that that enactment does not extend to the tolls in question.

The tolls in question are in no way claimed for or in respect of persons using the bridge; but the float in question is attached to the northern pier of the bridge, and there is no access to it from the land, except by passing over and along the northern end of the bridge to the pier, a distance of 400 feet or more, and down steps, forming part of the pier, to the float. All persons embarking on or disembarking from the defendants' steamboats, at the float, use the bridge in the above manner to get to shore, or from the shore to the steamboats.

The plaintiffs' right to take the tolls from the defendants was admitted: the only question in dispute being, as to whether or not the plaintiffs are bound in law to charge the tolls payable for steamboat passengers equally on the defendants' Company and *The London and Westminster Steamboat Company*, under the circumstances stated.

The question for the opinion of the Court was—Whether the plaintiffs were so bound. If the Court should be of opinion in the negative, judgment was to be entered for the plaintiffs; if in the affirmative, for the defendants.

Lush, for the plaintiffs. There is nothing in either of their Acts to impose on the plaintiffs the obligation of charging a uniform toll to both the steamboat Companies in respect of their passengers. By the original Act

11 G. 4. c. lxx., sect. 76, the plaintiffs are empowered to charge, in respect of steamboat passengers landing on or embarking from their wharf or causeway, the tolls "which shall at any time or from time to time be fixed and appointed by the" plaintiffs, "not exceeding the" "tolls" specified in the second schedule to the Act; *i.e.*, not exceeding 2d. for each passenger. Provided, therefore, the plaintiffs keep within that limit, they may, if they think fit, charge different tolls for different sets of passengers. [*Cockburn C. J.* Does not the direction in the statute that the tolls are to be "fixed and appointed" seem to imply that a uniform toll for all persons is to be fixed?] The only object of that direction is to inform the public what the toll is, and to let them see that it is not in excess of the amount authorized by the Act. There could be no objection to a graduated scale of tolls, within the maximum limit, for different classes of passengers. [*Cockburn C. J.* Can the plaintiffs first publicly fix and appoint the amount of toll, and then make private bargains with different steamboat companies varying the amount? *Hill J.* If so, the toll is fixed only subject to some future private bargain. By stat. 11 G. 4. c. lxx. s. 76. the toll is to be paid in respect of every passenger landing or embarking.] The toll payable in respect of each passenger is that which the plaintiffs choose to demand in respect of him. The effect of sect. 53 of the later Act, 6 & 7 W. 4. c. cxxxiii., is merely to give the plaintiffs the same right to levy toll in respect of steamboat passengers at the plaintiffs' landing float, which they had, under the original Act, at their wharf. Both Acts are alike silent as to any necessity for the plaintiffs to charge one and the same toll for every such passenger. The other side will rely on sect. 125

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of stat. 6 & 7 *W. 4. c. cxxxiii.* But that section is in terms restricted to the tolls to be charged to persons using the bridge, and must be read in connection with sects. 122, 123 and 124, which also relate to such tolls exclusively. Those tolls are not levied by the plaintiffs, but by *The Hungerford Bridge Company*. The omission of the Legislature to enact an equality clause with reference to the tolls to be charged for the use of the landing float by the plaintiffs, *The Hungerford Market Company*, furnishes a strong argument that it was not their intention to enforce the same uniformity of charge in respect of such tolls. It must also be remembered that these tolls are taken by the plaintiffs by virtue of the earlier Act; whereas the tolls to which sect. 125 of the later Act refers were first imposed by that Act.

J. Brown, for the defendants. Stat. 6 & 7 *W. 4. c. cxxxiii.* applies, in terms, to "the tolls to be taken by virtue of" that Act; and that the tolls taken by the plaintiffs in respect of the use by steamboat passengers of the landing float are such tolls is shewn by sect. 53, which first empowered the plaintiffs to levy them; the earlier Act making tolls payable in respect of the use of the plaintiffs' market and wharf only. It is the usual practice to introduce an equality clause into Acts of Parliament empowering Companies to levy tolls upon the public; and if there is any room for doubt as to the extent of the powers so conferred, the construction of the Act most beneficial to the public ought to be adopted; *Stockton and Darlington Railway Company v. Barrett (a)*, *Stourbridge Canal Company v. Wheeley (b)*.

(a) 8 *Sc. N. R.* 641.

(b) 2 *B. & Ad.* 792.

Assuming, however, that the plaintiffs take these tolls by virtue of the earlier Act and not of the later, there is enough in the earlier Act, though it does not contain an express equality clause, to impose on them the duty of charging a fixed toll to all persons alike. Sect. 76 empowered them to charge, in respect of every passenger landing on or embarking from the wharf or causeway authorized by sect. 69 to be made, the tolls to be from time to time fixed and appointed by the plaintiffs to be paid for the same; by which must have been intended fixed and uniform tolls payable by or for every passenger alike. Although the rate of toll might be fixed from time to time, there were not to be different rates in existence at one and the same time. If the plaintiffs have the power of charging all but one favoured steamboat Company a maximum toll, and that Company a toll of a nominal amount, they can practically give the favoured Company a monopoly of the use of the pier, by charging all others so high a rate of toll as virtually to exclude them from it. Although no decision precisely in point with the present case can be found, *Rex v. Trustees of the Bury and Stratton Roads* (a) is very analogous. There, the trustees of a turnpike road were authorized by their Act to take at each and every of the several and respective turnpike gates erected on the road certain specified tolls. By another section it was made lawful for them, at a meeting to be holden for that purpose, whereof notice in writing was to be affixed on all the turnpike gates erected on the road, to lessen and reduce, and again to raise and advance, all or any of the tolls thereby granted; and such tolls, so reduced or

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advanced, were to be collected as the tolls thereby granted. It was held that, under this Act, the trustees were authorized to reduce or advance any one of the four descriptions of tolls at all the gates, but not to reduce or advance them at one gate and not at another. *Bayley J.*, in delivering judgment, said :—" It seems to me to be quite clear, adverting to the Act of Parliament, that the power to reduce the tolls is only to reduce them at all the different gates. The Act imposes four descriptions of tolls to be taken at each and every of the several and respective turnpike or toll gates. The first upon every horse, mule, or ass drawing any description of carriage; the second upon the same class of animals not drawing; the third upon every drove of oxen, cows, calves, &c.; the fourth upon every drove of hogs, swine, &c. It is clear, therefore, that in the first instance there was to be one uniform rate of tolls at all the gates. That must have been the understanding of the inhabitants near the road at the time when they consented to have the turnpike gates erected. Then there is a provision for reducing and advancing all or any of the tolls, and that provides that notice of the meeting of the trustees to be convened for that purpose shall be affixed on all the toll gates, and that the tolls so reduced or advanced are to be collected as the tolls thereby granted. Now I think that, as the notice is to be fixed upon *all* the gates, and as the toll granted by the Act of Parliament was one uniform toll to be collected at *all* the gates, the Legislature must have intended to give the trustees power to reduce or advance all the tolls, or any one of the four descriptions of tolls which they are authorized by the former clause to take at *all* the gates, but that they did not intend to give them power to

reduce or advance the tolls at one gate and not at another. I think if they had intended to give the trustees such a power, they would have introduced an express clause into the Act of Parliament for that purpose." These observations are strongly in favour of the defendants in the present case; especially as the plaintiffs are required, by stat. 11 G. 4. c. lxx. s. 80., to "set up and maintain in some conspicuous part of the" "market a table of the tolls, wharfage, and stallage to be taken by virtue of" that Act. In *Lees v. The Manchester and Ashton Canal Company* (a) the defendants were empowered by statute to take rates, not exceeding a maximum per ton per mile, upon coal; and to reduce the rates at a general meeting of their proprietors held after notice, and with the consent of a majority in value of such proprietors. The defendants made a contract, but not at a general meeting, whereby they agreed, for certain considerations, to carry coals for certain individuals at a lower rate than that fixed; and this contract was held to be illegal and void. Lord *Ellenborough* C. J., in delivering the considered judgment of the Court, said:—"The public have an interest that the canal shall be kept up, and whatever has a tendency to bring it into hazard is an encroachment upon their right in it. They have also an interest that the tolls shall be equal upon all; for if any are favoured, the inducement to the Company to reduce the tolls, generally, below the statute rate is diminished. But as it is sufficient in this case to say that this bargain is not binding upon the Company of proprietors, inasmuch as it abridges their rights in a way the statutes do not warrant, it is unnecessary to give an opinion whether it so interferes

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with the rights of the public, as to be on that ground also void."

Lush, in reply. [The Court stated that they were agreed in his favour, on the point that stat. 6 & 7 *W.* 4. c. cxxxiii. s. 125. did not apply to the tolls taken by the plaintiffs.] There is no analogy between the present case and *Rex v. Trustees of the Bury and Stratton Roads* (a). That decision turned on the construction of the particular turnpike Act involved, and has no general application. [Hill J. Turnpike trustees have power, under their Acts, to compound with individuals for tolls. Do you say that the plaintiffs, in the absence of an express statutory power to that effect, are at liberty to reduce their tolls in favour of particular persons?] Yes, in the absence of an express prohibition in their Act. Stat. 11 *G.* 4. c. lxx. s. 76. cannot be converted, by any ingenuity of argument, into an equality clause. A direction not to take more than a fixed toll in respect of each passenger is not equivalent to a direction not to take less than that toll in respect of any passenger. The matter therefore stands thus: that the Legislature, having imposed no equality clause by that Act on the plaintiffs, by the later Act, 6 & 7 *W.* 4. c. cxxxiii., did impose an equality clause (sect. 125) on *The Hungerford Bridge Company*, but not on the plaintiffs; thereby shewing an obvious intention to leave the plaintiffs as unfettered in this respect as before.

Cur. adv. vult.

COCKBURN C. J. now delivered the judgment of the Court (b). The facts of this case are as follows. *The*

(a) 4 *B. & C.* 361.

(b) *Cockburn C. J., Hill and Blackburn Js.*

Hungerford Market Company were, by their Act of incorporation, 11 G. 4. c. lxx. (a), empowered to take, in respect of commodities embarked or landed at a wharf to be erected by them under the powers of the Act, as also from the masters of all steamers or passage boats in respect of passengers embarking or landing at such wharf, such tolls, within the maximum specified by the Act, as should at any time or from time to time be fixed and appointed by the Company. An Act was subsequently passed, 6 & 7 W. 4. c. cxxxiii., for building a foot bridge over the *Thames* from *Hungerford Market*. The 53rd section of that Act, after reciting the foregoing provision of *The Hungerford Market Act*, and that it was contemplated that the northern pier of the bridge should be a landing place for passengers, instead of, or in addition to, the wharf, empowered *The Hungerford Market Company* to levy and receive, in respect of all passengers and baggage embarking or disembarking at the said pier or landing place, or any float attached thereto, the same tolls as they were empowered to take at their wharf under the former Act. The bridge having been built, and the northern pier having been used as a landing place, *The Hungerford Market Company* have fixed and appointed the rate of tolls to be paid, conformably to the requirement of stat. 11 G. 4. c. lxx.: but they, in practice, make a distinction between different steamboat Companies; charging a higher rate of toll, though not exceeding the amount fixed, to those who charge a higher fare to passengers, and a proportionately lower toll to those who carry passengers at a cheaper rate; with the object, as they allege, of encouraging the cheaper rate of conveyance in order to attract a greater number of passengers, and

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with the rights of the public, as
also void."

Lush, in reply. [The
agreed in his favour, or
c. cxxxiii. s. 125. d:
the plaintiffs.] T

defendants, *The*
his arrangement
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pany are bound to
. every passenger, with-
. for our decision is whether
Company are under this obliga-
sent case and opinion that they are not. There is
ton Roads (o' ner of the local Acts, rendering it the
of the p^r ne *Hungerford Market Company* to charge
genera'
pow^{er} of the two Acts has, it is true, an equality clause (a);
fr^{om} it is clear that this clause applies only to tolls taken
by *The Hungerford Bridge Company*. The Act is silent
as to any such obligation, on the part of *The Hungerford*
Market Company, with respect to any tolls taken by the m.
We were at first struck with the argument that,
by the 76th section of *The Hungerford Market Act* (b) X
the tolls authorized to be taken are required to be fixed
and appointed by the Company, a toll lower than the
so fixed and appointed could not be properly considered
as coming within the terms of the power. But w^h
think a sufficient answer to this argument was given b^y the
the counsel for the plaintiffs, and that the true construction
tion of the clause in question is, that the tolls must be
fixed and appointed in order to communicate to the publi^c
or persons interested the maximum toll they can be
called upon to pay; leaving the right of the Company
to lower or remit the tolls, if it otherwise exist, wholly
untouched. We have therefore to consider whether a
Company entitled to take tolls in return for public

(a) Stat. 6 & 7 W. 4. c. cxxxiii. s. 125.

(b) 11 G. 4. c. lxx

service is bound, independently of express provision, to exact the same tolls from all persons alike, or is at liberty, if so minded, to remit the tolls, or any portion of them, to particular individuals at its pleasure and discretion. No authority has been adduced for the former of these propositions. In *Lees v. The Manchester and Ashton Canal Company* (a) the observations of Lord Ellenborough go no further than to shew that, on grounds of public policy, it may be desirable that such an obligation should attach to the power of a public Company to take toll. Yet authority would certainly seem to be required to establish a proposition directly at variance with the well known axiom that everyone is at liberty to renounce a right established in his favour. The power to take the tolls is conferred on the Company in consideration of service to be rendered, and accommodation to be afforded, to the public. If the service be rendered and the accommodation afforded, the obligation of the Company is fulfilled. If it omit to exact the toll which is the consideration for the service, the shareholders would seem to be the only persons who can have a right to complain. The argument sought to be drawn from the fact that it has been the habit of the Legislature in modern times, when conferring on Companies powers to construct great public works and to take tolls in respect of them, to introduce provisions for ensuring that such tolls shall be levied equally on all, is only available to establish that, in the opinion of the Legislature, it is, as a matter of public policy, desirable that this equality should be observed. Such express enactment seems, on the other hand, to amount to a legisla-

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thereby to increase their revenue. The defendants, *The City Steamboat Company*, who under this arrangement are called upon to pay the higher toll, object, contending that *The Hungerford Market Company* are bound to charge an equal toll in respect of every passenger, without distinction. The question for our decision is whether *The Hungerford Market Company* are under this obligation. We are of opinion that they are not. There is no clause in either of the local Acts, rendering it the duty of *The Hungerford Market Company* to charge equal rates on all who use the wharf or the pier. The later of the two Acts has, it is true, an equality clause (a) but it is clear that this clause applies only to tolls taken by *The Hungerford Bridge Company*. The Act is silent as to any such obligation, on the part of *The Hungerford Market Company*, with respect to any tolls taken by them. We were at first struck with the argument that, as by the 76th section of *The Hungerford Market Act* (b) the tolls authorized to be taken are required to be fixed and appointed by the Company, a toll lower than that so fixed and appointed could not be properly considered as coming within the terms of the power. But we think a sufficient answer to this argument was given by the counsel for the plaintiffs, and that the true construction of the clause in question is, that the tolls must be fixed and appointed in order to communicate to the public or persons interested the maximum toll they can be called upon to pay; leaving the right of the Company to lower or remit the tolls, if it otherwise exist, wholly untouched. We have therefore to consider whether *The Company* entitled to take tolls in return for public

(a) Stat. 6 & 7 W. 4. c. cxxxiii. s. 125.

(b) 11 G. 4. c. lxx.

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tive recognition of the fact that, in its absence, a power to take tolls does not necessarily imply an obligation to exact them uniformly from all persons alike. The powers of *The Hungerford Market Company* were conferred before the practice of introducing what are called "equality clauses" into private Acts of Parliament had sprung up. The *Hungerford Bridge Act* appears to have been one of the first Acts into which such a clause was introduced. There is nothing, therefore, to lead us to suppose that, when the *Hungerford Market Act* was passed, the Legislature had adopted the view which it appears since to have acted. At all events, omission to extend the provision as to equality, expressly imposed by the *Hungerford Bridge Act* on the *Hungerford Bridge Company*, to the *Hungerford Market Company*, in respect of the tolls which the latter were by that Act authorized to take, is strong to shew that no such obligation had been imposed by implication by the *Hungerford Market Company's Act*. No such obligation having been imposed by the original *Hungerford Market Company's Act*, and the powers given this Company in the latter Act being as it were substituted, so far as the pier was concerned, of those given by their own Act, it may have been deemed unjust to impose this obligation *ex post facto* by the subsequent Act. The result then is that, in our opinion, there neither arises upon these Acts of Parliament, nor exists at common law, any obligation on this Company to exact uniform tolls, provided they keep within the amount fixed and appointed conformably to stat. 11 G. 4. c. lxx.; and that, consequently, our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

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SMITH, appellant, against The Overseers of
 St. MICHAEL, CAMBRIDGE, respondents.

Saturday,
 November 17th.
 Monday,
 November 26th.

ON an appeal to the Cambridge Borough Quarter Sessions by the appellant, against a poor rate for the parish of *St. Michael*, in that borough, made on 15th *July*, 1859, the Sessions stated the following case for the opinion of this Court:—

The appellant is, and at the time of making the said rate was, the tenant of the house No. 8, *Rose Crescent*, in the parish of *St. Michael*. The rent paid by him to *Charles Claydon*, the owner of the house, is 52*l.* 10*s.* per annum. A portion of the house, consisting of five of the principal rooms thereof, is, and at the time of

Appellant, distributor of stamps at *C.*, rented a house there at 52*l.* 10*s.* per annum. By agreement with the Commissioners of Inland Revenue he let five principal rooms and a closet, in this house, for the use of the surveyor of taxes and of the collector of Inland Revenue for *C.*

By the agreement, possession was to be given and rent to commence at a given time, and appellant was to be paid "the annual consideration of 90*l.*; this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same." One other room in the house was occupied by appellant as an office for vending stamps and transacting other public business connected with his duties as stamp distributor. He employed an assistant in this room, who also took in there for him private orders for printing, which he executed elsewhere. The remainder of the house, consisting of two kitchens and a cellar on the basement, and a sitting room and two bedrooms on the second floor, was occupied by a man and his wife and daughter, under an agreement by which appellant, besides allowing him to live rent free, paid him 6*l.* 10*s.* yearly and found him with coals and candles; he in return cleaning the rooms and lighting the fires. Appellant exhausted, annually, the whole of the 90*l.* payable to him under the first mentioned agreement, with the exception of 2*l.* 10*s.*, in paying his own rent; the expenses of coal, fuel and gas; the wages of the man before mentioned; and other incidental expenses.

On a case stated for this Court, on an appeal by appellant to Sessions against a poor rate for *C.* to which he was rated on the full annual rateable value of the whole house: Held, that appellant was properly rated; for that he was the beneficial occupier of the whole house in his capacity as a subject. That the five rooms and closet were not in the separate possession of the revenue officers; and the fact that appellant's benefit, in respect of that part of the house, was derived from payments made to him by servants of the Crown for privileges given to them in that capacity, did not exempt him from rateability: and that the room occupied by appellant himself was not occupied by the Crown through him as its servant.

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making the rate was, occupied by the surveyor of Her Majesty's taxes, and by the collector of Inland Revenue, under the following agreement:—

"*Cambridge*.—With a view of concentrating all the Inland Revenue Offices in *Cambridge* in one central building, situate and being No. 8, in *Rose Crescent*, in the parish of *St. Michael*, in the town and county of *Cambridge*, I, *Henry Smith*, distributor of stamps at *Cambridge*, on the one part, do hereby covenant and agree to let to the Honourable Board of Inland Revenue five rooms and a closet in the aforesaid building, for the purposes hereinafter mentioned, retaining the front shop in my own possession, as the stamp distributor's office; and I, *Stephen Roose*, collector of Inland Revenue for *Cambridge* collection, on behalf of the Honourable Commissioners of Inland Revenue, on the other part, do hereby agree to take the five rooms and closet referred to above, for the purposes and subject to the conditions hereinafter mentioned, namely:—

"Ground floor, No. 1. For the surveyor of taxes' office; being the first room as you enter on the left hand side, with a closet therein.

"No. 2. For the Journal office; being the back room on the same floor.

"First floor, No. 3. For the collector's public receiving office; being the front room, with a closet therein.

"No. 4. For the collector's private office, and adjoining the public office.

"Second floor, No. 5. For the surveyor of taxes' store of blank forms; being immediately on the right hand on the upper stairs, with a closet opposite No. 5 for excise stores, &c.; and also the general use of the watercloset. For the annual consideration of 90*l*.; this

sum to include all expenses, namely, rent, rates, taxes, **gas**, wood, coals, also providing a trustworthy person to **reside** on the premises to keep clean, light fires, and **attend** to the same.

“Possession to be given and rent to commence on **25th March**, 1858; such rent to be paid half yearly, **namely**, on 29th *September*, *Michaelmas*, and on 25th *March*, *Lady Day*, in each year. As witness our hands **this 24th February**, 1858.

“*Henry Smith*, Distributor of Stamps for *Cambridge*.

“*Stephen Roose*, Collector of Inland Revenue, on behalf of the Commissioners of Inland Revenue, *London*.”

Another part of the house, consisting of one room **only**, is, and at the time of making the rate was, occupied by the appellant solely and exclusively, with the exception hereinafter stated, as an office for the vending of stamps by him as distributor of Stamps for the *Cambridge* district, and for the transaction of public business connected with his office of distributor of stamps for the said district. The remainder of the house, consisting of two kitchens and a coal cellar in the basement, and three rooms on the second floor (one whereof is used as a sitting room and the other two as bedrooms), is occupied by a person named *Wood* and his family, under the circumstances hereinafter stated. The appellant has agreed with *Wood* that the latter shall live upon the premises, and he pays *Wood* 6*l.* 10*s.* yearly, besides allowing him to live rent free and finding him with coals and candles. For this payment and allowance *Wood*, whose family consists of himself, his wife and daughter, cleans the rooms and lights the fires, and he has the exclusive use of the kitchens and of two of the said

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rooms on the second floor. The appellant employs an assistant in his office, who also takes in orders under the advertisement hereinafter mentioned; and the appellant is paid by a commission on the stamps sold by him. The appellant is the printer of *The Cambridge Independent Press* newspaper, published in *Cambridge*; and carries on a separate and distinct business as a printer, residing in a house on the *Market Hill*, where the business of printing and publishing the said newspaper is carried on, and where he carries on such private printing business. In the said newspaper, published on 21st *December*, 1859, and on subsequent days, there appeared the following advertisement:—"Printing of every description economically, expeditiously and neatly executed, at 11, *Market Hill*, and 8, *Rose Crescent, Cambridge*, where all orders will be thankfully received." Similar advertisements appeared in other publications. The No. 8, *Rose Crescent*, mentioned in the said advertisement, is the house in question. Previously to occupying the said house, the appellant occupied and used, as an office for the vending of stamps, a shop in a house opposite, for which he paid a rent of 14*l.* a year; and no abatement was made in the amount at which that house was rated, on account of such part thereof being so occupied.

The appellant is rated to the house duty in respect of the said house.

The rent of 90*l.* per annum payable to the appellant under the said agreement is, with the exception of 2*l.* 10*s.* per annum, exhausted by payments made by the appellant for the following purposes, that is to say, the said rent of 52*l.* 10*s.* per annum to the said *Charles Claydon*; the expenses of coal, firewood and other fuel,

gas, wages to a person employed to reside on the premises in order to take care of the same, tenant's repairs, and other incidental expenses.

The appellant is rated for the said house in the said rate on the sum of 42*l.*, being the full annual rateable value thereof, after making the deductions required by law.

The question for the opinion of the Court was, whether the appellant was liable to be rated in the said rate, in respect of the said house or any part thereof.

The rate was to be affirmed or quashed according as the Court should be of opinion that the appellant was or was not liable to be so rated in respect of the whole of the house; and was to be amended if the Court should be of opinion that he was liable to be so rated in respect of part only of the house.

O' Malley, for the respondents. The appellant is liable to be rated as the beneficial occupier of the whole of the house. No part of the house is in the exclusive occupation of servants of the Crown, for Crown or Government purposes. It is a private house, rented by the appellant as a private person; he deriving a profit from his occupation of the whole. It is true that that profit is partly derived from the payment which he receives from the Commissioners of Inland Revenue for the five rooms and the closet which are used by the surveyor of taxes and the collector of Inland Revenue. Those persons, however, are merely in the position of lodgers, paying for the use of the rooms and for the other accommodation afforded them; and no legal distinction exists between the profits which the appellant derives from them, and those which he derives otherwise from the house. [*Black-*

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rooms on the second floor. The other side will contend that the assistant in his office, who is the demise of the five rooms the advertisement here is of effect; the stipulation that appellant is paid by a rent and other outgoings, and to by him. The appellant is a person to reside on the premises *Independent Press*, &c., displaces such a construction. and carries the appellant is not entitled to exemption from printer, re respect of the room which he himself occupies for the purpose of distributing stamps. It appears business carried on for the purpose of his private business as a printer. But, assuming that he used the room for no other purpose than that of sending stamps, there is nothing in the case to shew that the locality is essential for that purpose. The room is not found him by the Commissioners of Inland Revenue, nor do they require him to reside there, or consider the occupation of it as part of his remuneration. He is paid by a commission on the stamps which he sells; and this he receives irrespectively of the place of sale. He, therefore, no more occupies the room in question as a servant of the Crown, than a stationer who is licensed to sell stamps in his private shop occupies the shop as such a servant; or, indeed, than the *Attorney General* can be said to occupy his chambers as a servant of the Crown. The fact that the Crown does not require the appellant to reside in this particular house for the discharge of his duties distinguishes the case from *Regina v. Stewart (a)* and *Gambier v. Lydford (b)*.

Lush, contra. The agreement between the appellant and the Commissioners of Inland Revenue amounts

(a) 8 E. 2 B. 360.

(b) 3 E. 2 B. 346.

demise of the five rooms and closet; and

the Commissioners have a separate posses-

sion of the occupation of them, as undertenants

Pro tanto, therefore, the appellant is

not to be rated. Apart, indeed, from the ques-

tion of exclusive occupation, he is exempt from rate-

ment in respect of these rooms, on the ground that they are used only by servants of the Crown for the performance of their duties. This latter ground of exemption applies also to the appellant's own occupation of the room which he uses for vending stamps. The facts shew that the different parts of the house are occupied or used by different servants of the Crown, solely for the performance of their respective duties under the Crown. There is, therefore, no such beneficial occupation by a subject as can make the appellant rateable.

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O'Malley, in reply. The question is, whether the house consists of one or of two tenements, and by whom it or they is or are occupied. If the appellant occupies the whole, he is rateable for the whole, no matter what lodgers he takes, or what the purposes for which they use the rooms in which they lodge. It is clear, from the facts, that he does occupy the whole, and that the revenue officers are not underlessees.

Cur. adv. vult.

HILL J. now delivered the judgment of the Court. In this case, which was argued before my Brother *Blackburn* and myself, we took time to consider whether the appellant was to be considered occupier of the whole of the house in respect of which he was rated, or whether five rooms and a closet in that house were in the occu-

1860. *burn J.* I suppose that the other side will contend that the agreement amounts to a demise of the five rooms and closet.] It has no such effect ; the stipulation that the appellant is to pay rent and other outgoings, and to provide a trustworthy person to reside on the premises to keep them clean, &c., displaces such a construction. Again, the appellant is not entitled to exemption from rateability in respect of the room which he himself occupies for the purpose of distributing stamps. It appears from the case that he also takes in orders there in the way of his private business as a printer. But, assuming that he used the room for no other purpose than that of vending stamps, there is nothing in the case to shew that the locality is essential for that purpose. The room is not found him by the Commissioners of Inland Revenue, nor do they require him to reside there, or consider the occupation of it as part of his remuneration. He is paid by a commission on the stamps which he sells; and this he receives irrespectively of the place of sale. He, therefore, no more occupies the room in question as a servant of the Crown, than a stationer who is licensed to sell stamps in his private shop occupies the shop as such a servant ; or, indeed, than the *Attorney General* can be said to occupy his chambers as a servant of the Crown. The fact that the Crown does not require the appellant to reside in this particular house for the discharge of his duties distinguishes the case from *Regina v. Stewart (a)* and *Gambier v. Lydford (b)*.

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to a present demise of the five rooms and closet; and the officers of the Commissioners have a separate possession and exclusive occupation of them, as undertenants to the appellant. Pro tanto, therefore, the appellant is not liable to be rated. Apart, indeed, from the question of exclusive occupation, he is exempt from rateability in respect of these rooms, on the ground that they are used only by servants of the Crown for the performance of their duties. This latter ground of exemption applies also to the appellant's own occupation of the room which he uses for vending stamps. The facts shew that the different parts of the house are occupied or used by different servants of the Crown, solely for the performance of their respective duties under the Crown. There is, therefore, no such beneficial occupation by a subject as can make the appellant rateable.

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O'Malley, in reply. The question is, whether the house consists of one or of two tenements, and by whom it or they is or are occupied. If the appellant occupies the whole, he is rateable for the whole, no matter what lodgers he takes, or what the purposes for which they use the rooms in which they lodge. It is clear, from the facts, that he does occupy the whole, and that the revenue officers are not underlessees.

Cur. adv. vult.

HILL J. now delivered the judgment of the Court. In this case, which was argued before my Brother *Blackburn* and myself, we took time to consider whether the appellant was to be considered occupier of the whole of the house in respect of which he was rated, or whether five rooms and a closet in that house were in the occu-

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pation of the Commissioners of Inland Revenue. There is no doubt that exclusive possession of a part only of a house may be given, so as in effect to make the two parts of the house separate tenements : the question in the present case was, whether such possession had been given ; and we are of opinion that it had not. The agreement between the appellant and the representatives of the Commissioners of Inland Revenue is set forth in the case. By it the appellant contracted to give to the Inland Revenue the exclusive enjoyment of five rooms and a closet in his house ; and in the agreement it is expressed that the appellant " agrees to let " and the other party takes the rooms, and it is stipulated that " possession " shall be given and rent commence at a particular time, all of which are words properly applicable to a demise of the five rooms. But at the same time it is stipulated ; " For the annual consideration of 90*l.* : this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same." We think that we must look not so much at the words as the substance of the agreement ; and, taking the whole together, we think it must be construed, not as a demise of the five rooms, but as an agreement by which the appellant, retaining possession of those rooms and keeping his servant there, bound himself to supply the other party there with fire and gas and attendance. It is true that the exclusive enjoyment of the rooms is to be given ; but that is the case where a guest in an inn or a lodger in a house has a separate apartment, or where a passenger in a ship has a separate cabin ; in which case it is clear that the possession remains in the

innkeeper, lodging-house keeper, or shipowner. We think, therefore, that the appellant was occupier of the whole of the rated property.

The other points in the case were disposed of during the argument. It is established law that if property is in the occupation of the servants of the Crown for public purposes, it is exempt from rates. The reason is thus expressed by Lord Campbell in *Smith v. Guardians of Birmingham* (a): "No property can be rated unless there be a subject having a beneficial occupation in respect of which he may be rated." In the present case the appellant is a subject, occupying in his own right the house in question, and deriving benefit to himself from his occupation. It is true that the benefit which he derives arises partly from payments made to him by the servants of the Crown, for privileges given to them in that capacity; but there is no authority, nor do we see any reason on principle, for extending the exemption to such a case. As to the room which the appellant himself occupies, and in which he distributes stamps, there is no pretence for saying that the Crown occupies that room through him as its servant.

Judgment, therefore, must be given in support of the rate.

Rate affirmed.

(a) 7 E. & B. 483. 489.

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Monday,
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The QUEEN, on the prosecution of The Churchwardens and Overseers of the Township of RUSHTON SPENCER, respondents, *against* The NORTH STAFFORDSHIRE Railway Company, appellants.

Deductions from rateable value held allowable to a railway Company, upon assessment to poor rate, in respect of the portion of their line passing through, and of the station, buildings and sidings within, a township; on the following principles.

UPON appeals by *The North Staffordshire Railway Company* against two rates made for the relief of the poor of the township of *Rushton Spencer*, in the county of *Stafford*, the following case was, by consent and by order of *Hill J.*, stated for the opinion of this Court, under stat. 12 & 13 *Vict. c. 45. s. 11.*

The *North Staffordshire* Railway passes through the

1. That the percentage amount to be allowed the Company for interest on capital and tenant's profits was to be calculated upon the depreciated value of the rolling stock at the time the rate was made, not upon its cost price.

2. The Company being obliged to provide (in addition to the rolling stock), turntables, cranes, weighing machines, stationary steam engines, lathes, electric telegraph and apparatus, office and station furniture, and gas works used for supplying the stations with gas: Held, that a deduction should be allowed for interest on capital and tenant's profits, in respect of such of these articles as were moveable; for instance, the office and station furniture: but not in respect of such of them as were either so attached to the freehold as to become part of it, or, though capable of being removed, were so far attached as that it was intended that they should remain permanently connected with the railway or the premises used with it, and remain permanent appendages to it, as essential to its working.

3. It being necessary, in order to carry on the business of the railway, that the Company should have in hand, at command, a sum of money by way of floating capital, for providing surplus stores (as rails, sleepers &c.), to be used in case of accident on the line, or other emergency, and partly for paying the wages of servants of the Company and other current expenses: Held, that the question whether a deduction should be allowed, for interest and tenant's profits, or either, upon this floating capital, must depend on whether, on the whole capital employed, a greater delay occurred in realising the returns than is ordinarily incident to the employment of capital. That a deduction was allowable in respect of any such delay, but not in respect of a delay in realising the profits on a part only of the capital, if compensated by the more than ordinary quickness of the return on the rest.

4. That the deduction to be allowed in respect of the stations, buildings and sidings along the line, must be calculated on the actual value at which they ought to be assessed, and not upon the original cost of construction.

township of *Rushton Spencer* for a distance of 104 chains, and, in respect of this portion of their line of railway, and the station, buildings and sidings within the said township, the appellants are assessed in each of the said rates upon a net rateable value of 219*l*. The appellants and respondents have agreed to take, as the gross earnings in the said township of *Rushton Spencer* for one year, the sum of 1761*l*. The total working expenses of the whole line for one year, ending 30th *June*, 1858, including rates and taxes and Government duty, and certain tolls payable to *The Midland Railway Company*, amounted to the sum of 132,290*l*. (The several items composing this sum were then set out.) Of which sum of 132,290*l* it has also been agreed that the sum of 965*l*. is the fair proportion chargeable to the said township of *Rushton Spencer*, and to be deducted from the said gross earnings in ascertaining the net rateable value of the said line in the said township. The appellants and respondents differ as to certain other items of deduction hereinafter mentioned.

The rolling stock of the Company, which includes all the locomotive engines, tenders, passenger carriages, horse boxes, carriage trucks, luggage vans, goods, cattle and mineral waggons, and all other vehicles of every kind for the conveyance of persons, cattle, animals, goods, wares, minerals, merchandise, or other articles, matters, or things whatsoever, on the railway, cost the Company the sum of 356,843*l*.: And for the purposes of this case it is admitted that this was a fair price at the time the articles constituting the rolling stock were purchased; and also that similar articles would at the time of laying the rate have cost as much. In addition to this stock the Company has been obliged to provide, at

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1860. a cost of 52,950*l.*, turn tables, cranes, weighing machines, stationary steam engines, lathes, electric telegraph and apparatus, office and station furniture, and gas works used for supplying the stations with gas. The turn tables and some of the weighing machines are affixed to the freehold by means of an iron rod inserted in a large stone sunk in the land. The lathes and steam engines are connected with the buildings in which they are placed by means of iron bolts. The electric telegraph apparatus consists, first ; of posts driven into the ground ; Secondly ; of wires passed through sockets annexed to such posts, but which wires may be disconnected from the posts without injuring or displacing them ; Thirdly ; of the electrifying machines, which are in no way affixed to the freehold. The gas works consist partly of buildings and partly of gasometers, retorts and the other usual plant for making gas ; and of the pipes for conveying the same from the works to the railway stations. The other weighing machines, which are all used for the purposes of the traffic on the line, and the office and station furniture, are unconnected with the freehold. Beyond these amounts of capital, the Company allege, and for the purposes of this case it may be admitted to be the fact, that it has been found necessary, in carrying on the traffic and business of the railway, that the Company should have in hand, at command, a sum of money by way of floating capital, for providing surplus stores (such as rails, sleepers, &c.), to be used in case of accident on the line or other emergency, and partly for paying the wages of porters, pointsmen, and other servants of the Company, and the other current expenses of the line, which are for the most part paid weekly or at other short periods; whilst it is found

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necessary to give credit to some of the goods' traffic customers of the Company to a large amount and for various periods. The traffic over the whole of the Company's line of railway is worked under a contract between the Company and the contractors, Messrs. *Joseph and Henry Wright*, which contract, it has been agreed, shall form part of this case. The total amount of the deductions made by the Company from the contractors, at the time when the rates were made, in respect of the depreciation of the rolling stock and plant in the hands of the contractors, was 71,000*l.*, which sum would not be more than sufficient to restore the said rolling stock and plant to its original value; but which sum, it is admitted, has not been expended in such restoration.

The Company have also expended in the erection of their stations, buildings and sidings the sum of 360,000*l.*

The respondents contend that the deduction to be allowed in respect of interest on capital and tenant's profits ought to be ascertained by taking, as the capital sum upon which such interest and profits ought to be calculated, the actual or depreciated value of the rolling stock at the time the rates were made; and that no allowance for interest and tenant's profits should be made in respect of a floating capital. The respondents also contend, that the deduction to be allowed in respect of the turn tables, cranes, weighing machines, stationary steam engines, lathes, electric telegraph apparatus, gas-works, stations, buildings and sidings, ought to be ascertained by taking the amount at which they are collectively assessed to the relief of the poor in the several parishes and townships within which the same are severally situated, and dividing the said amount amongst each

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parish and township in a certain proportion agreed upon between the respondents and appellants.

The appellants contend that they are entitled to claim, as the proper deduction in respect of interest on capital and tenant's profits, the per centage amount calculated upon the whole amount of the said capital sums of 356,843*l.*, 52,950*l.*, and the floating capital. They also contend that the proper deduction to be allowed in respect of all the stations, buildings and sidings, is 6*l.* per cent. per annum (which is a moderate rate of interest for money invested in buildings) upon the original cost of construction, and to take the annual amount so ascertained as the value to be deducted. And it is agreed, with reference to this head of deduction, that the original cost of construction of the whole of such stations, buildings and sidings was 360,000*l.*

The questions for the opinion of the Court were ;

First. Whether the per centage amount to be allowed for interest on capital and tenant's profits was to be calculated upon the capital invested in the rolling stock taken at its cost price, or upon the depreciated value of the rolling stock as estimated at the time when the rates were made, or at any other time.

Secondly. Whether the appellants were entitled to a deduction, for interest on capital and tenant's profits, upon the said sum of 52,950*l.*, the additional amount of capital invested in turn tables, cranes, weighing machines, stationary steam engines, lathes, electric telegraph and apparatus, office and station furniture, and gas works, or upon any and what portion of such items; and, if so, whether upon the sum originally invested in the said plant, or upon the depreciated value of the same, esti-

mated at the time the rates were made, or at any other time ; or how otherwise a deduction, if any, should be made in respect of the last mentioned plant, or in respect of any part thereof.

Thirdly. Whether the appellants were entitled to a further deduction for interest and tenant's profits, or either, upon the said floating capital.

Fourthly. Whether the deduction to be allowed in respect of the stations, buildings and sidings, along the line of railway, ought to be ascertained by taking the rateable value at which the same were assessed to the relief of the poor, or by allowing 6l. per cent. upon the original cost of construction, as contended for by the appellants ; or how otherwise a deduction should be made in respect of the said stations, buildings and sidings.

And it was agreed that, upon the decision of the Court being given on the said several questions, the proper amount of assessment to the said rates should (if necessary) be ascertained and settled in conformity with such decision, by agreement between the parties or by an accountant to be appointed by the attorneys on both sides ; and the rate amended accordingly. And it was further agreed that judgment confirming or (if necessary) amending the said rates, in conformity with such decision, and for such costs as the Court should direct, should be entered on motion by either party, at the Sessions for the said county next or next but one after such decision should have been given.

Lush, for the respondents (a). First : the percentage amount to be allowed the appellants for interest on

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capital and tenant's profits is to be calculated upon the depreciated value of the rolling stock, as estimated at the time when the rates were made; and not upon the capital invested in the rolling stock taken at its cost price. This point has already been decided by the Court, in *Regina v. Great Western Railway Company (a)*. The percentage is to be allowed upon the value which a hypothetical tenant, taking the line at the time the rates were made, would have had to give for the rolling stock; and it is clear that he would then have given no more than the depreciation price. In order to have entitled themselves to an allowance on the cost price, it was incumbent on the appellants to keep the value of the rolling stock up to that price; and they have not done so. Secondly: The appellants are not entitled to any deduction for interest on capital and tenant's profits upon the additional amount of capital invested in turntables, cranes, and such of the other articles specified in the case as are fixtures; though it may be conceded that a deduction must be allowed in respect of the office and station furniture, which are mere movable chattels. With that exception the articles specified are fixtures attached to the freehold, and, though easily removable without injury to the freehold, intended to remain permanently connected with it, and essential to the working of the line; and *Regina v. Southampton Dock Company (b)* is expressly in point to shew that no deduction can be claimed in respect of them. Real property to which machinery is attached for business purposes, ought to be assessed according to its actual value as combined with the machinery, without considering whether the ma-

(a) 6 Q. B. 179.

(b) 14 Q. B. 587.

chinery be real or personal property; *Regina v. Guest* (a). Thirdly: the appellants are not entitled to a further deduction for interest and tenant's profits, or either, upon the floating capital. In addition to every possible item of expenditure which they can endeavour to insist upon as deductions from their profits, they say that the necessity for keeping this floating capital unemployed operates in effect as a further deduction. It does not appear, however, that they have thus to reserve any sum in excess of their daily receipts. [*Hill J.* The case finds that they are obliged to give large credit to some of their customers for various, and possibly considerable, periods.] The hypothetical tenant would be obliged to put by money to provide for his rent; and would not be entitled to any deduction from rateability in respect of such money. [*Blackburn J.* More than ordinary delay in realizing the profits would be a ground on which the tenant might insist for an abatement of the rent. *Cockburn C. J.* The delay would diminish the profits pro tanto.] Fourthly: The deduction to be allowed in respect of the stations, buildings and sidings along the line of railway ought to be ascertained by taking the proper rateable value of the land occupied by them, as enhanced by their construction. The rateable value at which the stations, &c., ought to be assessed, rather than that at which they are actually assessed (one alternative suggested in the case), is the true standard of rateability. That the value ought not to be estimated according to their original cost and interest thereon (the other suggested alternative), is shewn by *Regina v. Great Western Railway Company* (b).

(The case was then adjourned.)

(a) 7 A. & E. 951.

(b) 6 Q. B. 179.

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Scotland, for the appellants (a). As to the first point, whether the percentage amount to be allowed for interest on capital and tenant's profits is to be calculated upon the depreciated value of the rolling stock at the time the rates were made, or upon its value at cost price; no doubt the calculation ought not to be made upon the cost price if it can be shewn that, owing to a fall in the price of labour or materials, the stock could now be purchased at a lower rate. That, however, is not a fact found in the case; from which it merely appears that the appellants keep back a certain sum annually, intended for the ultimate renewal of the rolling stock. This sum ought not to be deducted from the cost price, before making the calculation of tenant's profits upon it; for when the time comes for the renewal of the stock it saves an expenditure equal to the whole of the cost price. [Blackburn J. When the stock requires renewal it is still worth a considerable sum. The renewal might be effected by the addition annually of new stock in small quantities.] In calculating his profits the hypothetical tenant would be entitled to deduct the sum annually laid by for the purposes of the renewal, as being part of the necessary expenditure upon the working of the line. [Hill J. No doubt the appellants would be entitled to this deduction if they had annually kept the rolling stock up to its original value; but, as they have not done so, we must overrule *Regina v. Great Western Railway Company* (b) if we decide this point in your favour.] In *Regina v. London, Brighton and South Coast Railway Company* (c) it was held that a railway Company is entitled to a deduction from the rateable value in order to

(a) *Wednesday, November 21st.*

(b) 6 Q. B. 179.

(c) 15 Q. B. 313.

countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the proposed rent which is the measure of the assessment : and that the Company is not disentitled to such deduction because it has not incurred the expense, nor laid by from its receipts any sum to meet it when it should arise ; although the Company ought to set apart the sum which it claims to deduct, and, whenever the time comes for actually making the restoration, will be estopped from claiming more than that deduction. The accumulation of funds for the purpose of the renewal of the rolling stock is clearly a charge upon the occupation of the line, regarded as a railway ; for without it the Company could not continue to carry on business. As to the second point, it is admitted by the other side that the appellants are entitled to a deduction in respect of the additional capital invested in furniture and other things which are not fixtures ; but it is said that they are not so entitled in respect of capital invested in fixtures. The test of rateability in this respect, however, is not simply whether fixed machinery is or is not a fixture, but, further, whether or not it would be provided by a landlord for the hypothetical tenant, and would be ancillary to the occupation of the hereditament by the latter for the purpose of carrying on a business ; whether or not, in short, it would be a landlord's fixture ; *Regina v. Haslam*(a). If such machinery would not be a landlord's fixture, the deduction ought to be allowed in respect of it. Now, many of the things specified in the case would not be provided by the appellants for the supposed tenant, who would have to find them himself. Lathes are an

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(a) 17 Q. B. 220.

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instance. [*Hill J.* The turntables, at all events, are part of the actual permanent way.] The question as regards turntables equally with the other fixed machinery is, whether the value of the railway to a tenant is or is not increased by them. If it is, the appellants are rateable in respect of them; *Rex v. Birmingham and Staffordshire Gas Light Company (a)*. If it is not, and the tenant would have to find the machinery himself (an assumption not inconsistent with any fact found in the case), the value of the machinery ought to be regarded as a deduction from tenant's profits. [*Blackburn J.* The question rather is, what machinery would pass with the line if it were let?] That is the same question under another aspect. As to the third point: The appellants are entitled to a further deduction for interest and tenant's profits upon the floating capital. They are compelled always to have in hand a certain sum of money in lieu of the returns, which take time to realize. The ready money takings being insufficient to meet the outgoings, there is a constant necessity, from one year to another, that this floating capital should be at command. A tenant would have to take this into consideration in taking the property. [*Blackburn J.* Probably the appellants are entitled to a deduction in respect of the interest on the floating capital; but can they claim any further allowance?] That is a sub-division of the question. It must be remembered that the principal is necessarily employed for the very purpose of realizing the returns upon which the appellants are rated; that it is essential to the carrying on of their business, and contributes, so to speak, to the earnings of the line. The

(a) 6 A. & E. 634.

appellants are therefore entitled to a deduction for tenant's profits, also, upon it. There is no distinction in principle between the floating capital and the capital invested in the locomotive stock, or in any other branch of the concern. [*Blackburn J.* There is this distinction, that money invested in stock cannot be easily realized, and the realization may occasion loss; whereas money lying at a bank is realized already.] The two classes of capital may be at different risks, which may affect their respective arithmetical amounts; but in principle they are both employed in the same way upon the business. A similar allowance to that claimed by the appellants under the present head was made to the water Company in *Regina v. Mile End Old Town*(a), and passed without objection. As to the fourth point: The deduction to which the appellants are entitled in respect of stations, buildings and sidings ought to be ascertained by allowing 6*l.* per cent. on the cost of their original construction. The other side admit that this deduction should be on the footing of the proper rateable value of the stations &c.: and their cost price, plus 6*l.* per cent. upon it, is their proper rateable value, in the absence of proof that they could now be built cheaper.

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Lush was heard in reply.

Cur. adv. vult.

COCKBURN C. J. now delivered the judgment of the Court (b). Four questions are propounded in this case for the decision of the Court. The first is, whether the Percentage amount to be allowed for interest on capital

(a) 10 Q. B. 208.

(b) Cockburn C. J., *Hill* and *Blackburn Js.*

1860. and tenant's profits is to be calculated upon the cost price of the rolling stock, or on the depreciated value which that stock may bear at the time the rate is actually made. We are of opinion that the allowance must be made with reference to the actual and not to the original value. This point has already been decided by this Court in the case of *Regina v. Great Western Railway Company (a)*, in which decision we entirely concur. In addition to the reasons given in the judgment of the Court in that case it may be observed that, as, under The Parochial Assessment Act, the tenant's profits upon stock must necessarily be calculated with a view to their deduction from the gross earnings, in order to ascertain what a tenant would give for the entire property, nothing could be more inconvenient than that a different principle should prevail in calculating the profits in the two cases. Now the question, when considered under The Parochial Assessment Act, must be looked at, not with reference to the railway Company, who may have expended on the purchase of the stock a much larger sum than such stock would now realize, but with reference to an incoming tenant and the amount of capital which such tenant would have to lay out in the purchase of the rolling stock necessary to carry on the undertaking. It is obvious that what it would be worth the while of a person or Company about to embark in a commercial undertaking to give as rent for the premises in which it was to be carried on, would depend on the amount to be deducted, in addition to repairs and other necessary outgoings, from the gross earnings, in respect of the profits due to the capital to be employed in the concern.

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(a) 6 Q. B. 179.

But it is plain that a tenant would calculate such profits on the amount of capital actually required to be expended on the stock ; not on what may have been the value of such stock at some other time or in other hands. Now it must be assumed that the stock, in its existing condition, is sufficiently effective to produce the earnings which, after the necessary deductions, constitute the improved value of the railway ; and it cannot reasonably be supposed that, if the Company were about to give up the undertaking, they would not be willing to part with their stock at its actual value ; or that, if they refused to do so, the incoming tenant could not procure other stock of an equally efficient character, at its real value, to supply the deficiency. In estimating therefore, under *stat. 6 & 7 W. 4. c. 96.*, what a tenant would pay, the profits must be calculated on the actual value of the stock. It cannot be supposed that, in exempting profits under *stat. 6 & 7 Vict. c. 48.*, a different principle of calculation was intended to be acted on.

The second question is, whether the Company are entitled to a deduction in respect of various articles therein specified, being things necessary for carrying on the business of the Company. The articles to which such a question may have reference may be divided into three classes. First, things movable, such as office and station furniture ; Secondly, things so attached to the freehold as to become part of it ; and, Thirdly, things which, though capable of being removed, are yet so far attached as that it is intended that they shall remain permanently connected with the railway or the premises used with it, and remain permanent appendages to it as essential to its working. It is clear that, in respect of the first class of articles, a deduction should be allowed.

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It is equally clear that no deduction should be allowed as to the second. As to the third, the question is finally settled by the decision of this Court in the case of *Regina v. Southampton Dock Company* (a).

The third question, whether the Company are entitled to a deduction in respect of the floating capital therein referred to, is one of considerable nicety, and which, as it appears to us, must depend on whether, on the whole capital employed, a greater delay occurs in realizing the returns than is ordinarily incidental to the employment of capital. No doubt as the rent which the imaginary tenant, contemplated by The Parochial Assessment Act, could afford to pay, would be the difference between the gross earnings (after the necessary deductions) and the amount of profits due (reference being had to the nature of the undertaking) on the capital employed; whatever tends to diminish such profits must go, pro tanto, to diminish the rent. Any delay in realizing the profits, beyond such as is generally incidental to the ordinary employment of capital, may therefore (as it must be presumed that it would be taken into account by the tenant) be fairly taken into account in determining the rateable value. On the other hand, it must be observed that, as a very large proportion of the earnings of a railway Company is of a ready money character, it may well be that, when the whole of the capital and of the earnings are taken into account, the profits on the whole capital may be realized in a shorter time in this species of undertaking than on the average of commercial enterprises. If this should be the case, the delay in realizing that profit which might arise

(a) 14 Q. B. 587.

as to a part of the capital might well be considered to be compensated by the more than ordinary quickness of the return on the rest. We have no means before us of determining the question with reference to *this* view of the case. We can do no more than point out the principle by which we think it must be determined.

As regards the fourth question, we are of opinion that the deduction to be allowed in respect of stations, buildings and sidings must be calculated on the actual value at which they ought to be assessed, and not on the original cost of construction.

Rates to be amended, if necessary,
on the principles laid down in the
judgment.

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C A S E S

ARGUED AND DETERMINED

IN

MICHAELMAS VACATION,

XXIV. VICTORIA.

The Judges of the Court of Queen's Bench who sat in
Banc in this Vacation were:

COCKBURN C. J.	
WIGHTMAN J.	HILL J.
CROMPTON J.	BLACKBURN J.

*Tuesday,
November 27th*

WRIGHT v. WILKIN.

[Reported in the Queen's Bench, and in the Exchequer
Chamber on error from that Court, 2 B. & S. 232.]

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IN THE EXCHEQUER CHAMBER (a).

(Error from the Queen's Bench.)

The Company of Proprietors of the STOURBRIDGE
Navigation *against* The Earl of DUDLEY. *Tuesday,*
November 27th.

ERROR was brought by the plaintiffs, upon the judgment of the Queen's Bench given in favour of A canal Act,
16 G. 3. c.
xxviii., provided that no
owner of any

mines should carry on any work for the getting of coal or minerals within the distance of twelve yards from the canal, nor should any coals or other minerals be got under any part of the canal, or the towing-paths thereunto belonging, or under any reservoir to be made by the canal Company, or within or under any land or ground lying within the distance of twelve yards of either side of the canal, or of any reservoir, except as therein-after mentioned, without the consent of the Company.

By another clause it was provided, that when the owner of any coal mine &c. lying under the canal or reservoirs, or within the distance thereinbefore limited, should be desirous of working the same, then such owner should give a written notice of his intention to the Company three calendar months before he should begin to work such mines lying as aforesaid; and upon the receipt of such notice it should be lawful for the Company to inspect such mines, in order to determine what coal or other minerals might be come at and be actually gotten; and if the Company should neglect to inspect such mines within thirty days after the receipt of such notice, it should be lawful for the proprietors of such mines, and they were thereby authorized, to work such part of the said mines as lay under the canal or reservoirs, or within the distance aforesaid: and if upon inspection the Company should refuse to permit the owners of the said mines to work such part of the said mines lying as aforesaid, or any part thereof, as they might have come at and actually gotten, then the Company should, within three calendar months, pay to the owners the value thereof.

By another clause it was provided, that nothing in the Act contained should defeat, prejudice, or affect the right of any owner of lands or grounds in, upon, or through which the canal &c. should be made, to the mines lying within or under the lands or grounds to be set out and made use of for such canal &c.; but all such mines were thereby reserved to such owners respectively; and it was declared that it should be lawful for such owners, subject to the conditions therein contained, to work all such mines: Provided that in working such mines no injury were done to the said navigation.

The owner of a coal mine gave the statutory notice to the Company of his intention to work it under and within twelve yards' distance of one of the Company's reservoirs. The Company did not thereupon either inspect the mine, or refuse to permit it to be worked, or pay the owner the value of it.

Held that the mine owner, after the expiration of the time limited by the Act for the

(a) Before *Willes, Byles and Keating Js., Martin, Channell and Wilde Es.*

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Company to take those steps, was entitled, notwithstanding the proviso to the last mentioned clause, to work the mine under the reservoir in the usual and ordinary mode; and that no action lay against him by the Company for damage caused to the reservoir by reason of such working.

the defendants (a) upon a case stated by consent and by order of *Hill J.*, which was in substance as follows.

The action was brought to recover damages for injury to a reservoir and dam of the plaintiffs by the mining operations of the defendant.

The plaintiffs were incorporated by stat. 16 *G.* 3. c. xxviii. (b), for the purpose of making and maintaining a canal from *Stourbridge*, in the county of *Worcester*, to *Stourton*, in the county of *Stafford*; and two collateral cuts therein mentioned. By this Act (c), p. 737, they were required to make "satisfaction" "for all damages to be sustained by the owners or proprietors of such lands, tenements, or hereditaments, waters, watercourses, brooks, or rivers, respectively, as" should "be taken, used, removed, diverted, or prejudiced, in or by the execution of all or any of the powers of" the "Act." At p. 745, they were empowered to make reservoirs and other works, "doing no injury thereby to any mines lying under or near to such reservoirs" and other works, "and making recompense and amends to the owners

(a) On *Friday*, 10th *June*, 1859. The case is not reported, the Court having given no reasons for their judgment, saying that the matter, being *res integra*, had better be decided at once by the Court of Exchequer Chamber.

(b) Local and personal, public. "For making and maintaining a navigable canal from or near the town of *Stourbridge*, in the county of *Worcester*, to join the *Staffordshire* and *Worcestershire* Canal, at or near *Stourton*, in the county of *Stafford*; and also two collateral cuts, one from a place called *The Fens*, upon *Pensnet Chace*, to communicate with the intended canal near the junction of *Wordesley Brook* with the river *Stour*; and the other from a place called *Black Delph*, upon the said chace, to join the first mentioned collateral cut at or near certain lands called *The Lays*, in the parish of *Kingswinford*, in the said county of *Stafford*."

(c) The Act not being divided into sections, it is necessary to refer to its paging.

and proprietors of lands, in manner as" therein was "directed and provided, for any lands to be taken or used, or for any damage to be occasioned to any other lands by reason of the making of any such reservoirs" and other works. At p. 749 and following pages certain persons were appointed Commissioners, "to determine and adjust" (p. 753) "from time to time, what distinct sum or sums of money" should "be paid by the" plaintiffs "for the absolute purchase of the lands or grounds which" should "be set out and ascertained" "for making the said canal, and collateral cuts, or any part thereof, and other the purposes in" the "Act mentioned; and also to determine and adjust what other distinct sum or sums of money" should "be paid by the" plaintiffs "as a recompense for any damages which" might or should "be, at any time or times whatsoever, sustained by" "persons" "being owners of, or interested in, any lands, grounds, tenements, hereditaments, and waters, for or by reason of the making, repairing, or maintaining, the said canal, or collateral cuts, or of any reservoirs" &c., inter alia, "by reason or means of the execution of any of the powers" therein contained, by the plaintiffs (p. 754). In case of dissatisfaction with the decision of these Commissioners juries were to be impannelled to decide the amount to be paid for purchase money, damages, &c., by the plaintiffs; and their verdict was to be final (pp. 754 to 756). Upon payment or tender, by the plaintiffs to the owners, of the purchase money for lands, when thus ascertained, the "lands" "and the fee simple and inheritance thereof," were "from thenceforth" to "be vested in, and become for ever the sole property of, the" plaintiffs, "to and for the use of the said navigation, but to or for no other use

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or purpose whatsoever" (p. 759). At p. 794 it was enacted that all coals and other minerals which should be found and dug up, in making, carrying on and completing the canal, collateral cuts and other works authorized by the Act, might be taken, carried away and disposed of, for their own use and benefit, by the persons respectively in whose land or grounds the same were found and dug up. And, at p. 795, "That no owner or proprietor of any mines or minerals, their workmen or servants, or other person whatsoever," should "on any account whatever, open, dig, sink, or carry on, any work for the getting of coal, limestone, ironstone, or mineral, within the distance of twelve yards from the said intended canal or collateral cuts as aforesaid; nor" should "any coals, or other minerals, be got under any part of the said canal or collateral cuts, or the towing paths thereunto belonging, or under any reservoir or reservoirs to be made by the" plaintiffs, "or within or under any land or ground lying within the distance of twelve yards of either side of the said canal or collateral cuts, or of any reservoir or reservoirs, on any account whatsoever, except as" thereafter "mentioned, without the consent of the" plaintiffs "in writing under their common seal for that purpose, first had and obtained. Provided nevertheless, that when any mine of coal, ironstone, or other mineral, which" should "be worked agreeably to the directions of" the "Act, or any vein thereof," should "extend beyond the limits" thereinbefore "allowed for working the same, it" should and might "be lawful for the owner of any such mine, without any such consent as aforesaid, from time to time, upon making sufficient and necessary headways or tunnels under the said canal and collateral cuts and towing paths, and also under any

ground where such owners" were "restrained from working as aforesaid, to dig, make, and get, such coal, ironstone, or other minerals, beyond such limits; so as such headways or tunnels" did "not exceed six feet in height, nor four feet in breadth; and so as the same" were "not made nearer together than nine feet; anything" therein "contained to the contrary" thereof "in any wise notwithstanding." The Act then (at p. 796) empowered the Company to enter lands and mines adjoining their works, for the purpose of discovering whether any mine was being worked contrary to the directions of the Act; and (if it should be discovered that such was the case) to do everything necessary for the safety and security of their works; the costs and expenses whereof were to be recoverable in the manner specified in the Act. It was then provided (p. 797), "That when and so often as the owner or proprietor of any coal mine, limestone, or other minerals, lying under the said canal, or collateral cuts, or any such reservoir or reservoirs as aforesaid, or within the distance" thereinbefore "limited," should "be desirous of working the same, then, and in every such case, such owner or proprietor" should "give notice in writing, under his, her, or their hand or hands, of such his, her, or their intention, to the clerk for the time being of the" Company, "at least three calendar months before he, she, or they" should "begin to work such mines, lying under the said canal or collateral cuts, or the said reservoir or reservoirs, or within the distance aforesaid; and upon the receipt of such notice it" should "and might "be lawful for the said Company" "to inspect, or cause such mines to be inspected, in order to determine what coal or other minerals" might "be come at,

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and be actually gotten : and if the said Company" should "fail or neglect to inspect, or cause such mines to be inspected, within thirty days after the receipt of such notice, then it" should and might "be lawful for the owners or proprietors of such mines, and they" were thereby "respectively authorized to work and get such part of the said mines as" lay "under the said canal or collateral cuts, or the said reservoir or reservoirs, or within the distance aforesaid; and if, upon such inspection as aforesaid, the said Company" should "refuse to permit the owners or proprietors of the said mines to work such part of the said mines as" lay "under the said canal or collateral cuts, or the said reservoir or reservoirs, or within the distance aforesaid, or any part thereof, as they might, from time to time, have come at and actually gotten, or in any other manner obstruct or prevent them from getting the same; then the said Company" should, "within three calendar months after such refusal or obstruction as aforesaid, pay, or cause to be paid, to the owners, proprietors, or workers of such mines respectively, such price or prices for the same, in proportion to their several interests therein, as the next adjoining mines of equal quality" should "have been really and bonâ fide sold for, or be estimated or valued at:" which price, if disputed, was to be settled by the Commissioners or a jury. At p. 798 the owners of mines were authorized to work, carry on and drain the same, and to make cuts through their own lands to the canal or its collateral cuts; "so as no injury or damage be done thereby to the said navigation." At p. 816 it was provided "That nothing" in the Act "contained" should "extend, or be construed to extend, to defeat, prejudice, or affect the right of any lord

or lords of any manor or manors, common or waste grounds, or of any owner or owners of any lands or grounds in, upon, or through which the said canal and collateral cuts, towing paths, wharfs, quays, trenches, sluices, passages, watercourses, or conveniences aforesaid, or any of them," should "be made, to the mines, minerals, or quarries, lying or being within or under the lands or grounds to be set out or made use of for such canal and collateral cuts, towing paths, wharfs, quays, or other conveniences aforesaid, or any of them; but all such mines, minerals, and quarries," were thereby "reserved to such lord or lords of such manor or manors, or of such common or waste grounds, and to such owner or owners of such lands or grounds respectively, their heirs or assigns; And that it" should and might "be lawful to and for the lord or lords of such manor or manors, common or waste grounds, or such owner or owners of such lands or grounds respectively (subject to the conditions and restrictions herein contained) to work all such mines and quarries, and to take and carry away all such coals, ironstone, and minerals, as" should "be gotten therein, to his and their own use; provided that in working such mines and quarries no injury be done to the said navigation; anything" in the Act "contained to the contrary notwithstanding."

Under the powers vested in them by this Act the plaintiffs made the canal and the collateral cuts, and also certain reservoirs for supplying them with water, on certain common or waste lands within the manor of *Kingswinford*, in the county of *Stafford*; under an agreement for the purchase of those lands, with the late Viscount *Dudley* and *Ward*, who was then the lord of

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that manor, and as such entitled to the soil of the lands in question, and the minerals under the same. By indenture, dated 16th *January*, 1784, made between the said Lord *Dudley* and *Ward* and the plaintiffs, after reciting that the former, in pursuance of stat. 16 *G. 3. c. xxviii.*, had agreed to sell and convey to the Company, for the use of the said navigation, the parcels of land therein mentioned, his Lordship conveyed the same to the Company in fee; excepting and reserving to him and the persons entitled in remainder to the possession and inheritance of the said lands for the time being, and to his and their heirs and assigns respectively, all mines of coal, limestone, ironstone and other minerals in and under the said lands or any part thereof: with liberty of working and getting the same in such manner as was directed and prescribed by the said Act of Parliament. This deed, which contained a covenant by Lord *Dudley* and *Ward* for quiet enjoyment, was to be deemed part of the case. In the same year, but after the execution of this conveyance, an inclosure Act was passed, for inclosing the common and waste lands in the manor of *Kingswinford*. The Commissioners appointed by this Act (which was also to be deemed part of the case, but to which it is unnecessary further to refer) allotted to the Company a piece of land, parcel of the manor; and the Company thereupon built, upon that piece of land, a dam to one of their before mentioned reservoirs. The late Lord *Dudley* and *Ward* died in 1833, and thereupon the devisees in trust under his will became the lords of the manor of *Kingswinford*. In 1843, these trustees, who were then possessed of and working very extensive mineral property in the neighbourhood, were desirous of

getting the coal under and within the distance of twelve yards of the said reservoir and the works thereof; and they accordingly, on 10th *November*, 1843, gave a written notice, under their hands, to the clerk of the Company, of such desire, and of their intention to work the same, and to open, dig, sink and carry on the necessary works and operations for that purpose. The Company did not, after the receipt of such notice, inspect or cause to be inspected the said mines; or refuse to permit the said trustees to work such part thereof as lay under the said reservoir and works, or within twelve yards thereof. The trustees, after giving the said notice, continued to work mines near to the said reservoir and dam, though not within twelve yards of them, until the year 1853; when the defendant, under the limitations of the will of the late Lord *Dudley and Ward*, became lord of the manor of *Kingswinford*, and owner of the mines mentioned in the notice. Subsequently to that time the defendant continued working the said mines; and, in the years 1853, 1854 and 1855, worked and got large quantities of coal, as well under and within twelve yards of the said reservoir and under and within twelve yards of the said dam thereof, as also beyond such distance of twelve yards respectively. The construction of the said reservoir and dam had increased the liability of the surface to damage from mining operations underneath, and the defendant, by working the said mines, caused damage to the said reservoir and dam. If the land where the said reservoir and dam were constructed had remained in its original state as a common, a portion of the surface would have been let in, and the grass growing thereon destroyed, by the defendant's mining operations. The quantity of grass so destroyed would, however, have been so small

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that sufficient grass would have been left for the commoners.

For the purposes of the case it was to be taken as admitted that the defendant worked the said mines in the usual and ordinary mode of working mines in the district; and was not guilty of any negligence in working them, save in working them without leaving sufficient support for the said reservoir and dam; if, upon the facts stated, the Company were entitled to have such support left in working the mines. The Court was to have power to draw all such inferences of fact as a jury might properly draw.

The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover for the injury done by the working of the said mines or any part thereof.

Manisty, for the plaintiffs. The plaintiffs are entitled to recover. They had a right to the support of the land immediately underneath their reservoir, which was constructed on land purchased by them from the defendant's ancestor in 1784. By p. 737 of their Act, the plaintiffs were required to make satisfaction for all damages to be sustained by the owners of lands taken for or prejudiced by the execution of the powers of the Act. The deprivation of the right to work the mines, beneath the reservoir, in the direction of the surface, beyond the point which would leave sufficient support for the reservoir, was damage for which the defendant's ancestor was entitled to compensation under this provision, and for which it must now be assumed that he received compensation from the plaintiffs. At p. 795 there is an express prohibition upon the owners of mines or minerals, from

working and getting the same within or under any land or ground lying under, or within the distance of twelve yards from, any reservoir of the plaintiffs, without their written consent under seal. At p. 798, the owners of mines are authorized to work them, but only "so as no injury or damage be done thereby to the said navigation." So, at p. 816, a similar power is given to the lords of manors and others, but only "provided that in working such mines and quarries no injury be done to the said navigation." The other side will rely on the power given, at p. 797, to the owners of mines lying under the canal or reservoirs, or within the distance of twelve yards of them, to work the same, after giving three months' written notice to the plaintiffs of their intention to do so; and provided the plaintiffs should not, within thirty days after the receipt of such notice, have the mines inspected and refuse to allow them to be worked. It will be contended for the defendant that, inasmuch as the required notice was given to the plaintiffs so far back as 1843, and they never caused the mines to be inspected, or refused to permit them to be worked, in which event they would have been obliged to pay compensation, they have no ground of complaint against the defendant for working them within the twelve yards' distance. Conceding, however, that the omission to inspect, on the part of the plaintiffs, gave the defendant the right to work the mines, such right was nevertheless subject to the obligation, imposed upon him by other parts of the statute, so to work them as to do no damage to the plaintiffs' property. In *Caledonian Railway Company v. Sprot* (a) the plaintiffs' railway had been made under the powers of an Act which authorized them to take

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lands for the purpose, and authorized the owners of lands taken to reserve the minerals under them, and to work such mines after giving security to the plaintiffs for all damages and injury which might result. It was held by the House of Lords that a conveyance of land to the plaintiffs for the purposes of the line, gave a right by implication to all reasonable subjacent and adjacent support connected with the subject-matter of the conveyance; and therefore that, although in the conveyance the minerals were reserved, the grantor was not entitled to work them, even under his own land, in any manner calculated to endanger the railway. [*Willes J.* In *Fletcher v. Great Western Railway Company* (a) *Martin B.* points out that that case turned upon the construction of the conveyance regulating the rights of the parties between themselves, independently of an Act of Parliament.] The conveyance in *Caledonian Railway Company v. Sprot* (b) had to be construed with reference to the Company's Act, no less than the conveyance in the present case. The statute now in question, moreover, clearly prohibits such a working of the mines, under lands which have been conveyed to the plaintiffs, as shall do injury to the navigation. *Dudley Canal Navigation Company v. Grazebrook* (c) is no doubt undistinguishable from the present case, and is a direct authority against the plaintiffs. That decision is, however, open to review in this Court, and cannot be supported. It proceeded upon the erroneous view of the law enunciated by *Littledale J.*, at p. 68 of the report, namely, that, if there had been no Act of Parliament in the case, and a man had sold the land to the Company, reserving all mines to himself, he would have been entitled to

(a) 4 H. & N. 242, 253.

(b) 2 Macq. Sc. Ap. Ca. 449.

(c) 1 B. & Ad. 59.

the mines in the usual way, even if he had thereby made to the Company. According to that the owner of surface soil is not entitled at common law to the support of the subjacent strata; a doctrine now exploded by the cases of *Humphries v. Brogden* (a) and *Caledonian Railway Company v. Sprot* (b). [Martin B. In delivering the judgment of the Court in *Dudley Canal Navigation Company v. Grazebrook* (c) Bayley J. says, "It is not necessary to give any opinion whether the defendants could have got their minerals in any manner that they pleased, without being liable to an action. The point for our decision is, whether they are responsible for the damage done to the plaintiffs, by working their own mines in the ordinary and usual mode."] That is the same proposition which *Littledale J.* had enunciated. It is no longer law that the owner of mines may work them in the ordinary and usual mode, even if he, in so doing, takes away the support to the surface. In the next place, even should the Court consider that the plaintiffs are not entitled to support for their works from the mines which are worked by the defendant within twelve yards of them, they are clearly entitled to such support from all such mines of the defendant as are worked beyond that distance and diminish such support. With respect to these latter mines the Act of Parliament does not apply, and the plaintiffs' common law right remains unprejudiced; *North Eastern Railway Company v. Elliott* (d). [Willes J. I do not find it stated in the case that the plaintiffs' works have sustained

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(a) 12 Q. B. 739.

(b) 2 Macq. Sc. Ap. Ca. 449.

(c) 1 B. & Ad. 59. 68.

(d) Before Wood V. C., 1 John. & Hem. 145. Affirmed on appeal, by Lord Campbell, L. C., 2 De G. F. & J. 423.

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any damage from the working of the defendant's mines beyond the twelve yards distance.]

(*Manisty* also contended that the notice of 1843, given to the plaintiffs by the late Lord *Dudley's* trustees, was invalid; and, further, that, on the true construction of the Inclosure Act, the plaintiffs were entitled to the support of such of the defendant's mines as were worked under the dam constructed on land allotted to the plaintiffs under that Act. He ultimately, however, abandoned both these points.)

Sir *Fitzroy Kelly*, for the defendant. In the first place, no question is raised by the case as to any damage arising to the plaintiffs' works from the working of the defendant's mines beyond the twelve yards' distance from them. [*Martin B.* You need not trouble yourself on that point, which is evidently a mere afterthought on the part of the plaintiffs.] The only remaining question, then, is, whether the case of *Dudley Canal Navigation Company v. Grazebrook* (a) is or is not now to be overruled. That case is good law. The dictum in it of *Littledale J.*, on which stress has been laid by the other side, forms no part of the judgment, and refers to a question not raised by the case; namely, what would have been the rights of the parties at common law, apart from the plaintiffs' Act of Parliament. As in that case, so in the present, the rights of the parties depend, to adopt the language of the judgment (b), "altogether on the construction of the Act of Parliament under which the plaintiffs made their canal. They have no rights except what were given by that Act; the" defendant "had the property in the soil and mines, and all the rights of enjoying that property before the Act, and" he "still" retains "all that the Act has

(a) 1 B. & Ad. 59. 68.

(b) 1 B. & Ad. 69.

not taken away." The facts in both cases are similar, and the language of the respective Acts almost identical. The Court must give effect to the power to work the mines, even within the twelve yards' distance from the canal, given to the mine owner by p. 797 of the Act now under consideration. It is the plaintiffs' own fault, if they desired to prevent him from so doing, that they did not, on receipt of a notice in pursuance of that provision, take the course pointed out by the statute; by causing the mines to be inspected and paying a compensation for their refusal to let them be worked. The statute expressly empowers the owner to work the mines on the plaintiffs' failure to adopt that course; and imposes on the plaintiffs the obligation of purchasing the mines, if unwilling to allow them to be worked. The provisoes, at pp. 798 and 816, that the owners of mines are to do no injury or damage to the navigation in working the mines, cannot be treated as abrogating the express power given to the owners at p. 797, to work them within twelve yards of the canal, in the event of a failure by the plaintiffs to purchase them. Otherwise, the plaintiffs might always avoid the necessity of purchasing the mines, and, nevertheless, provided that injury was done to their property by the working, might bring an action for damages, or obtain an injunction in Chancery to prevent the working which they had never prohibited. In the judgment in *Dudley Canal Navigation Company v. Grazebrook* (a) it is said, with reference to a similar proviso in the Act there in question, requiring the owner of mines to do no injury, in working them, to the navigation; "If this proviso is to be construed literally, it is inconsistent with the sixty-second section (b); for if the

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(a) 1 B. & Ad. 74.

(b) Which was, in substance, the same as p. 797 of stat. 16 G. 3. c. xxviii.

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owner in working mines is to be responsible *at all events* for any injury or damage only to the canal, would the Company ever purchase the minerals from such owner? The provision as to the purchase would be nugatory. The only reasonable mode of reconciling these sections is, to say that the proviso "is to be construed with some qualification, viz ; either that the party working the mines is to do no unnecessary damage or injury to the navigation, or no extraordinary damage or injury by working them out of the ordinary or usual mode. With this limitation all the parts of the Act are consistent with each other." The suggestion made by the other side, that the late Lord *Ward* must have been compensated for his interest in the mines when the plaintiffs bought the surface, is wholly unfounded. It was at that time uncertain whether the mines would ever be worked ; and, in fact, notice of an intention to work them was not given by the vendor's representatives to the plaintiffs till fifty-seven years had elapsed from the purchase. Moreover, an assumption that the plaintiffs not only bought the surface but at the same time made compensation for the mines and minerals beneath, would be opposed to the policy of the Legislature, which, in passing railway and canal Acts, exempts Companies from the obligation of purchasing, in the first instance, more than the surface, which alone they require ; leaving the compensation to be paid for the support to the surface from underlying mines for future determination, when, if ever, the mine owner wishes to work them ; *Fletcher v. Great Western Railway Company* (a). *Caledonian Railway Company v. Sprot* (b) turned upon the effect, independently of any Parliamentary enactment, of the conveyance of the land to the Company, which was an ordinary common law con-

(a) 4 H. & N. 242.

(b) 2 Macq. Sc. Ap. Ca. 449.

veyance. It appears from the report that the Act under which the *Caledonian* Railway was originally formed contained no clause empowering the Company to stop the workings of mines if they chose. *North Eastern Railway Company v. Elliott* (a) was a case the circumstances in which were peculiar. It is, however, in favour of the defendant, so far as regards the working of the mines within twelve yards of the reservoir; and *Wood V. C.* did not dispute the soundness of the decision in *Dudley Canal Navigation Company v. Grazebrook* (b), which he thought, having regard to the different language of the respective Acts involved there and in the case before him, was distinguishable. *Wyrley Canal Company v. Bradley* (c) is another authority directly in point to shew that the plaintiffs, not having pursued the course pointed out by the statute to prevent the defendant from working the mines, have now no cause of action against him.

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Manisty, in reply. The Act under consideration in *Wyrley Canal Company v. Bradley* (c), as the reporter points out in note (a) to p. 371 of the report, did not contain a proviso restraining the mine owner from doing injury to the navigation in working the mines. At the same page *Dauncey*, arguendo, mentions a case of *Birmingham Canal Company v. Hawkesford*, tried before *Lawrence J.*, in which that Company, whose Act did contain such a proviso, obtained a verdict.

MARTIN B. We are all of opinion that the judgment of the Court of Queen's Bench must be affirmed. Mr.

(a) Before *Wood V. C.*, 1 *John. & Hem.* 145. Affirmed on appeal, by Lord *Campbell*, L. C., 2 *De G. F. & J.* 423.

(b) 1 *B. & Ad.* 59.

(c) 7 *East*, 368.

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Manisty in the first instance made three points. As to the first, he admitted that *Dudley Canal Navigation Company v. Grazebrook* (a) was a direct authority against the plaintiffs, and undistinguishable from the present case; and that, unless we now overruled that decision, we must give judgment against them. The second point, that no sufficient notice of intention to work the mines was given to the plaintiffs, he abandoned without argument. The third point, as to the plaintiffs' right of support for so much of their works as are constructed on land allotted to them under the Inclosure Act, failed on the facts; for it was not found that these works had not increased the weight on the strata of land below the surface. We come back then to the first point. And as to this, speaking for myself, I am of opinion that *Dudley Canal Navigation Company v. Grazebrook* (a) was rightly decided; and, had I now to consider the point for the first time, I should decide it in the same way. It seems to me that when, as in that case and in the present, there is a clause in an Act of Parliament empowering a mine owner to give notice to a Company, which has purchased the surface soil, of his intention to work the mines below; empowering the Company thereupon to have the mines inspected, and, if they choose, to prohibit the working and compensate the owner for the prohibition; and empowering the owner, in the absence of such inspection, prohibition and compensation by the Company, to act upon his notice and work the mines: the Company have no ground of complaint or cause of action against the mine owner, if he, on their failure to comply with the Act, proceeds to work the mines in the ordinary and usual mode, and in so doing occasions an injury to the Company's property. As to the plain-

(a) 1 B. & Ad. 59.

tiffs' contention, founded on the subsequent proviso in the Act before us, that the mine owner, in working the mines, is to do no injury to the navigation ; I think that Sir *Fitzroy Kelly* has given the true answer to it, in saying that the proviso is to be read and construed as subordinate to the main clauses of the Act. The case of *North Eastern Railway Company v. Elliott (a)* has been cited for the plaintiffs in support of the position that they are at all events entitled to maintain their action for the injury arising to their works from the working of the defendant's mines at a greater distance than twelve yards from the reservoir. The present case, however, does not distinguish between the effect of the workings within and beyond that distance. No damage is shewn to have been occasioned, otherwise than by the working of the mines within the twelve yards' distance. And with regard to damage thus caused, *North Eastern Railway Company v. Elliott (a)* appears to be in conformity with our view : so that it is unnecessary to consider whether we concur with that decision, so far as it bears upon the question of damage sustained by the plaintiffs from workings beyond the distance of twelve yards.

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STOURBRIDGE
Navigation
Companyv.
Earl of
DUDLEY.

WILLES J. and CHANNELL B. concurred.

BYLES J. I am of the same opinion. I found my judgment entirely upon the case of *Dudley Canal Navigation Company v. Grazebrook (b)*, which was decided thirty years ago and has been considered good law ever since.

KEATING J. and WILDE B. concurred.

Judgment affirmed.

(a) Before Wood V. C., 1 John. & Hem. 145. Affirmed on appeal, by Lord Campbell, L. C., 2 De G. F. & J. 423.

(b) 1 B. & Ad. 59.

1860.

Wednesday,
November 28th.

HEWER *against* COX.

Stat. 17 & 18
Vict. c. 36.

s. 1. requires a description of the residence and occupation of the person making a bill of sale of personal chattels to be filed with every such bill of sale; in order to the validity of the bill of sale as against creditors of that person.

G. & H., printers carrying on business in copartnership in *New Street, Blackfriars*, in the city of *London*, but not sleeping there, having made a bill of sale of the partnership goods, the description filed with the bill stated that they were printers and copartners, residing at *New Street, Blackfriars*, in the county of *Middlesex*.

Held that the description was sufficient, and the bill of sale valid: for that no creditor of *G. & H.* could have been misled as to their identity with the persons described, had the description merely specified *New Street, Blackfriars*, as their place of residence; and that the erroneous addition, "in the county of *Middlesex*," instead of "in the city of *London*," was only *falsa demonstratio*.

Held, further, that *New Street, Blackfriars*, was the residence of *G. & H.* within the meaning of the statute.

CASE stated under an interpleader order.

On 17th *September*, 1860, the sheriffs of *London* seized, under a writ of *fi. fa.*, at the suit of the defendant *Cox*, in an action by him against one *William Godson*, certain goods and chattels which, on 10th *February*, 1859, before the delivery of the writ to the sheriffs, had been assigned by the said *William Godson* and one *John Hogben*, the owners of the said goods and chattels, by bill of sale to the plaintiff *Hewer*. On 18th *February*, 1859, a copy of the bill of sale, and also an affidavit, made under stat. 17 & 18 *Vict. c. 36.*, were filed under the provisions of that Act. At the time of the execution of the bill of sale, and of the filing of the copy thereof, and of the swearing and filing of the affidavit, the said *John Hogben* resided at 2, *Holly Cottages, Welington Place, Stoke Newington*, in the county of *Middlesex*, and the said *William Godson* resided at *Palsgrave Place, Temple Bar*, in the county of *Middlesex*; and both carried on business in copartnership as printers, in *New Street, Blackfriars*, in the city of *London*, and not elsewhere, but did not sleep there. In the

said bill of sale and copy thereof, and also in the affidavit, the said *William Godson* and *John Hogben* were described as residing at *New Street, Blackfriars*, in the county of *Middlesex*, and as printers and copartners. There is no such place as *New Street, Blackfriars*, in the county of *Middlesex*, unless the aforesaid *New Street, Blackfriars*, in the city of *London*, can be so considered.

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HEWER
 v.
Cox.

On the seizure of the said goods and chattels by the sheriffs, the plaintiff *Hewer* claimed them as his property, by virtue of the said bill of sale. An interpleader summons was thereupon taken out by the sheriffs; upon which *Wilde B.*, the vacation Judge, made an order by consent, that this case should be stated, in which *Hewer*, as claimant, should be plaintiff, and *Cox*, as execution creditor, defendant.

The question for the opinion of the Court was, whether, under the above circumstances, the said bill of sale was duly registered within the intent and meaning of stat. 17 & 18 *Vict. c. 36*.

Horace Lloyd, for the plaintiff. The question is, whether the description of the residence of the assignors under the bill of sale, filed with the copy of the bill, was sufficient to satisfy stat. 17 & 18 *Vict. c. 36. s. 1.*, which requires "a description of the residence and occupation of the person making or giving the" bill of sale, to be filed together with the bill itself, or a copy of it, and an affidavit of the time at which it was made or given. The description is amply sufficient. In the first place, a man's place of business may be given as that of his residence, although he sleeps elsewhere; *Blackwell v. England* (a); where it was held that an attorney's

(a) 8 *E. & B.* 541.

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HEWER

v.

COX.

office might be given as the residence of that attorney's clerk. That decision was approved and acted upon in *Attenborough v. Thompson* (a). [*Wightman J.* We are all agreed that those cases are conclusive in your favour on this point.] Secondly, the situation of the place of residence is sufficiently stated, though not with strict accuracy. *New Street, Blackfriars*, is in the county of *Middlesex*, being in the city of *London*. Though the city of *London* is distinct, for some purposes, from the rest of the county, it is geographically within it. [*Blackburn J.* You may argue that "*New Street, Blackfriars*," would be sufficient, without the addition of "in the city of *London*;" and that, therefore, the addition "in the county of *Middlesex*," could not mislead any one.] Yes: the test is, whether the description would give sufficient information, or would mislead. In *Routh v. Roublot* (b) Lord *Campbell C. J.* says "I lay down no rule but this, that the affidavit required by the statute must give such information as reasonable persons would require." Reasonable persons, dealing with the firm of *Godson and Hogben*, could require no further information of their residence, than that it was in *New Street, Blackfriars*. There is but one place within the limits of the county of *Middlesex*, which answers that description. There is therefore nothing untrue in the description as it stands; as there was in the case of *Allen v. Thompson* (c), where the assignor of a bill of sale was described merely as a "gentleman" by occupation, whereas he had a specific occupation, being a clerk in a public office. [*Raymond*, contra, mentioned *Collins v. Goodyer* (d).] In that case it was held that '*Dorset Place, Clapham Road, Mid-*

(a) 2 H. & N. 559.

(c) 1 H. & N. 15.

(b) 1 E. & E. 850.

(d) 2 B. & C. 563.

desex,' was not a description of the true place of abode of a deponent, within the meaning of a rule of this Court, *Mich. 15. Car. 2*, the *Dorset Place* in question being in *Surrey*. There, however, the wrong county was mentioned; moreover, the requirements of the rule of Court were more stringent than those of stat. 17 & 18 *Vict. c. 36. s. 1*.

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 v.
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Raymond, *contra*. The requirements of the statute have not been complied with: and unless they are strictly complied with, the statute makes the bill of sale void against the creditors of the assignors. Whether therefore, or not, the inaccuracy of the description of the assignors' residence would mislead any one, the defendant, as execution creditor, is entitled to insist on his right to the goods. [*Blackburn J.* The question is, what is meant, in the statute, by a description of the residence of an assignor. Must it not refer to a description such as an ordinary man would understand?] Even adopting that view, ordinary men living at a distance from *London*, would be misled by the description in the present case. [*Wightman J.* Not so, if they made any inquiry.] A creditor is not bound to make any inquiry. The description "*New Street, Blackfriars*," is per se insufficient. There may be, and probably are, many other places in *England* called *Blackfriars*, besides that in the city of *London*. And an insufficient description cannot be cured by the addition of an inaccuracy. That which is incorrect cannot be said to explain. *Collins v. Goodyer* (a) is precisely in point for the defendant. No one could have been misled there, for there is but one

(a) 2 B. & C. 563.

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COX.

Clapham Road, yet the Court held that the addition "*Surrey*" made the description untrue. The rule of Court there under consideration required the true place of abode of a deponent to be inserted in an affidavit. So, by a description of the residence, in stat. 17 & 18 Vict. c. 36. s. 1., must be meant a true description of the residence. If a false description of the residence is given, the statute is not satisfied; and it is no answer to the objection grounded on the statute, that the description is equivalent to a true one and cannot mislead. Otherwise, the protection given by the Legislature to creditors might in numerous cases be frittered away. That the Act must be strictly complied with is well laid down by *Watson B.* in giving judgment in *Pickard v. Bretz* (a), where he says "Three things are to be stated in the affidavit, first, the time the bill of sale was made or given; secondly, the residence; and, thirdly, the occupation of the party making or giving it. The Legislature having passed an Act requiring these three things to be done for the prevention of fraud, it is not for the Courts to say that any one of them is immaterial. I can well understand why the Legislature should require a description of the occupation." I agree "that, provided the affidavit shews the occupation by reference to the bill of sale, that would be sufficient. But this affidavit does not; it neither states what the occupation is, nor whether the occupation mentioned in the bill of sale is correct. We should fritter away the Act by saying that this need not be done, when the statute requires it." [*Blackburn J.* Those observations would be in point if, in the present case, there had been no description of the place of residence of the assignors.]

(a) 5 H. & N. 9.

Horace Lloyd, in reply. The protection to creditors contemplated by the statute is sufficiently afforded, if the affidavit satisfies the rule laid down by Lord Campbell C. J. in *Routh v. Roublot* (a).

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(COCKBURN C. J. was absent.)

WIGHTMAN J. I am of opinion that there is a sufficient description in the affidavit, of the place represented as being the place of residence of the persons making the bill of sale, to satisfy the statute. The Act recites that frauds are frequently committed upon creditors by secret bills of sale of personal chattels. The object of the Legislature therefore was to afford creditors facilities for discovering whether any of the persons with whom they deal has made a bill of sale: and, in order to effect this object, it requires such a description of the residence and occupation of the person making or giving such a bill to be filed as shall enable that person's creditors to identify him and take precautions accordingly. Was, then, such a description filed in the present case? The two persons making this bill of sale carried on the trade of printers in partnership, and may, no doubt, be said to have resided in *New Street, Blackfriars*. It has been settled by previous decisions that a person may be said to reside at the place where he is to be found daily, although he sleeps elsewhere. The question is, whether the description of the residence itself is sufficient. It is described as *New Street, Blackfriars*, in the county of *Middlesex*, whereas there is no such street in that county, but there is in the city of *London*. Now all the cre-

(a) 1 E. & E. 850.

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ditors of these particular persons would be likely to know in what *New Street, Blackfriars*, they carried on business; and consequently, I think, and upon this I mainly found my decision, that *New Street, Blackfriars*, without more, would have been a sufficient description. To this description, however, an addition, untrue in fact, has been appended; namely, "in the county of *Middlesex*." But could any creditor be thereby misled? If not, we may disregard it. And I think that it could mislead no one. It is true that in *Collins v. Goodyer* (a) this Court held that the addition of a wrong county to the description of the place of abode of a deponent, in an affidavit to hold to bail, vitiated the description. That may have been a right decision, having regard to the wording of the rule of Court involved; the fact that personal liberty was in question may also, perhaps, have influenced the Court. It was given, however, many years ago; and, without expressing an opinion upon it, we need only say that the present is not a case in *pari materiâ*.

HILL J. I am of the same opinion. I agree with my brother *Wightman* that in order to gather the intention of the Legislature we must look at the recital in the statute. Now the recital is, that "Frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking the property of such persons, to the exclusion of the rest of

(a) 2 B. & C. 563.

their creditors." The object therefore, was to protect creditors; not those, only, to whom money might be owing from the assignor at the time of giving the bill of sale, but those, also, to whom he might afterwards, in the course of business, become indebted. To effect this object the Act proceeds to enact that every bill of sale, together with an affidavit of the time of its being given, and a description of the residence and occupation of the person making the same, shall be filed within twenty-one days after the making; and the question before us is, whether in the present instance the description of the residence and occupation of *Godson* and *Hogben*, the persons making the bill of sale, was sufficient under the Act. They are described as residing at *New Street, Blackfriars*, in the county of *Middlesex*, and as printers and copartners. The description of their occupation is correct; but *New Street, Blackfriars*, where they carry on business, is not in the county of *Middlesex*, but in the city of *London*. Now I take it that if the words "in the county of *Middlesex*," had been omitted from the description, no one who had dealings with the firm of *Godson* and *Hogben* could have doubted for a moment, on looking at the register of bills of sale, that they were the parties intended to be described. The question then arises whether the addition of the words "in the county of *Middlesex*" vitiates the description. I think that it does not, and that the maxim "*falsa demonstratio non nocet*" applies. A subsequent erroneous addition to the description of something already described with sufficient accuracy, does not affect its validity. We should be carrying the requirements of the Act further than the Legislature intended, were we to hold this description insufficient.

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BLACKBURN J. I am of the same opinion. The object of the Act was to protect the present and future creditors of persons giving bills of sale of personal chattels, and to prevent such creditors from being deceived by the false appearance of the possession by one man of property which had been assigned to another. This object is carried out by the requirement that a bill of sale shall, within a specified time from its execution, be registered, together with, inter alia, a description of the residence and occupation of the person or persons by whom it was made. I do not find that any necessity exists for mentioning the county or vill in which that residence is situated; all that is required is that the description shall be such as to convey to creditors dealing with the maker of the bill of sale, a reasonable knowledge of the identity of their debtor with that person. I think, therefore, that *New Street, Blackfriars*, would, per se, have been a sufficient description of the residence of the persons giving the bill of sale now in question. If so, does the erroneous addition, "in the county of *Middlesex*," vitiate the description? I agree with my brother *Hill* that it does not, and that the maxim "*falsa demonstratio non nocet*" applies; as he has stated in almost the same terms as those used by *Parke B.* in *Llewellyn v. Earl of Jersey* (a), who there says, "As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it, according to the maxim "*falsa demonstratio non nocet*.'" Perhaps if the addition had been "in the county of *York*," or if the name of some other distant

(a) 11 M. & W. 183. 189.

county had been inserted, it might possibly have misled creditors, and so have vitiated the description. But when we remember that the county of *Middlesex* abuts closely upon the city of *London* and, indeed, upon *New Street, Blackfriars*, it is impossible to suppose that any creditor of the assignors can have failed to know what *New Street, Blackfriars*, was meant. The other point, whether or not a man's place of business, at which he does not sleep, can be deemed to be his residence, has been already decided in the affirmative by previous cases.

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v.
Cox.

Judgment for the plaintiff.

The QUEEN, on the prosecution of the Churchwardens and Overseers of the parish of GATESHEAD, appellants, against The Inhabitants of ELSWICK, respondents (a).

Wednesday,
November 21st.

ON an appeal by the parish of *Gateshead*, in the county of *Durham*, to the Midsummer Quarter

C. rented and occupied the ground floor of a house, consisting of

a shop and two small rooms. Access to the shop and the rooms was gained by room doors opening out of a passage. This passage led through the house from the street in front to a yard at the back, and was closed by the house front door at one end and a back door at the other. *K.* rented and occupied the upper floor; access to which was gained by an outside staircase leading from the back yard. The bottom of this staircase was situated just outside the back door of the passage, and *K.* could gain it either from the rear of the house in the first instance, or by entering at the front door and passing through the passage to the rear. *C.* and *K.* each had a key of the front door, which door, and the passage, both of them used at pleasure, and they each kept clean a distinct half of the passage. Both front and back doors of the passage were kept closed at night.

Held, that the floor rented and occupied by *C.* was not "a separate and distinct dwelling house" within stat. 6 G. 4. c. 57. s. 2., and that, therefore, *C.* did not gain a settlement by renting it.

(a) This case, decided in last *Michaelmas* Term, has been accidentally misplaced.

1860.

HEWER
v.
COX.

BLACKBURN J. I am of the sam

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 floor let to one tenant, which it is not necessary
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 a distinct access of its own, and no communication with
 the rest of the premises. The ground floor, consisting of
 the rooms aforesaid, was let to the pauper, and was entered
 by a door from the street, which led into a passage which
 led through the house into a yard at the back, and was shut
 off from the street in front by a front door, and from the
 yard at the back by a back door. Out of this passage
 access was obtained to the shop and rooms occupied by
 the pauper by two panned room doors, one of which
 led into the shop, and the other into one of the rooms
 behind; only one of which doors, being that leading
 into the shop, was used by the pauper, the other one
 having been kept locked and nailed during the whole
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 the pauper communicated internally with each other.

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having been kept locked and nailed during the whole

of his occupation. The shop and rooms occupied by

the pauper communicated internally with each other.

1860. Sessions, 1860, for the town and county of *Newcastle-upon-Tyne*, against an order of justices for the removal of one *Benjamin Coots* from the township of *Elswick*, in the borough and township of *Newcastle-upon-Tyne*, to the said parish of *Gateshead*, the Sessions quashed the order, subject to the opinion of this Court on the following case.

The QUEEN
v.
ELSWICK.

The pauper, in the year 1851, rented the ground floor of a house in *Blenheim Street*, in the township of *Westgate*, in *Newcastle-upon-Tyne*, consisting of a shop and two small rooms; which, it was admitted by the respondents, was a good settlement by renting a tenement, provided the said tenement was a separate and distinct dwelling-house or building.

The house in question consisted of three floors. Each floor was let to separate tenants. There was a cellar floor let to one tenant, which it is not necessary to describe, as nothing turns upon it, further than that it had a distinct access of its own, and no communication with the rest of the premises. The ground floor, consisting of the rooms aforesaid, was let to the pauper, and was entered by a door from the street, which led into a passage which led through the house into a yard at the back, and was shut off from the street in front by a front door, and from the yard at the back by a back door. Out of this passage access was obtained to the shop and rooms occupied by the pauper by two paneled room doors, one of which led into the shop, and the other into one of the rooms behind; only one of which doors, being that leading into the shop, was used by the pauper, the other one having been kept locked and nailed during the whole of his occupation. The shop and rooms occupied by the pauper communicated internally with each other.

The door into the shop was locked at night. The upper floor of the house, immediately above the premises occupied by the pauper, was, at the time of his occupation, let to one *Kirkup*, and was entered by an outside staircase leading out of the back yard; the bottom of the staircase being situate just outside the back door of the passage aforesaid, on the ground floor. Access could be obtained to the said staircase from the street at the back of the house, by going through the back yard, without going into the house at all. This entrance was for the separate and exclusive use of the occupier of the upper floor; but a person wishing to get to the said outside staircase from the street in front of the house, could come in at the front door, through the passage, past the doors leading into the shop and rooms of the pauper, and so out at the back door of the said passage, and up the staircase. *Kirkup* and his family, as tenants of the said upper floor, had the right of using the access to the said staircase by the front door; which, as well as the back door, was always shut at night, but kept open during the day time; and he, as well as the pauper, had a key of the front door, and the said front door was used by both, as occasion required. The passage, also, was used by both the pauper and his family and *Kirkup* and his family, and was cleaned by them both; the pauper cleaning one half of the said passage, from the front towards the back, to a point beyond the two doors aforesaid, whilst *Kirkup* cleaned the remaining half. There were no means of closing the said passage from the street on the one side and the back yard on the other, except by the front and back doors aforesaid.

It was contended by the respondents that the pauper did not gain a settlement in the said township of *West-*

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The QUEEN
v.
ELSWICK.

1860. *gate*, inasmuch as the said tenement did not consist of a
 The QUEEN separate or distinct dwelling house or building.
 V.
 ELSWICK.

The question for the opinion of the Court was, Did the pauper gain a settlement by renting a tenement in *Westgate*? If the Court should be of opinion that he did, the order of Sessions was to be confirmed. If the Court should be of opinion that he did not, the order of Sessions was to be quashed, and the order of removal confirmed (a).

Davison, in support of the order of Sessions. The pauper gained a settlement by renting a tenement in *Westgate*. The question is, whether the ground floor rented by him was a "tenement" consisting "of a separate and distinct dwelling house or building," within the meaning of stat. 6 G. 4. c. 57. s. 2.; and the facts set out in the case shew that it was. The entire house was let in three separate floors; each of which had a separate and distinct entrance peculiar to itself. The other side will probably rely on the circumstance that *Kirkup*, the tenant of the upper floor, had a right of way through the passage which led to the tenement rented by the pauper. That, however, did not prevent the ground floor, which was occupied exclusively by the pauper, from being a separate and distinct dwelling house within the statute. *Rex v. Great and Little Unsworth and North Biddick* (b) is a direct authority to that effect. In that case, two outer doors and some steps, which

(a) The opinion of the Court was also asked upon facts relied upon by the respondents as establishing that the pauper had gained a settlement by apprenticeship in *Gateshead*. It is not, however, thought necessary to report the case as to this point.

(b) 5 A. & E. 261.

gave access to the middle floor of a house, were appropriated to the tenant of that floor exclusively. A separate flight of steps on the outside of the house led, by a different outer door, to a passage on the middle floor, from which passage another tenant, occupying the upper floor, reached his premises by a staircase of his own. One of the rooms belonging to the middle floor opened into this passage; and the tenant of that floor could not reach that room but by going up the last mentioned steps and along the passage, or by crossing the passage from his other rooms, by a door in one of them, which was usually locked. All these rooms communicated with each other and with both the doors appropriated to the tenant of the middle floor. This Court held that that floor was a separate and distinct dwelling house, within the statute. The facts in the present case are almost identical. [*Hill J.* There is this distinction; that in that case the tenant had the exclusive use of a separate and distinct entrance to the floor occupied by him. Not so the pauper in the present case.] The point substantially decided in *Rex v. Great and Little Usworth and North Biddick* (a) was that the common use of a passage by the tenants of two separate parts of a dwelling house would not prevent the part occupied by one of them from being a separate and distinct dwelling house. [*Hill J.* In *Rex v. Wootton* (b), *Patteson J.* says: "I have always thought that the words 'a separate and distinct dwelling house or building,' in these statutes, meant, separate and distinct as to any other person: that the tenant should not hold part of a house." *Cockburn C. J.* In *Rex v. Great and Little Usworth and North Biddick* (a) the middle floor, without the one

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(a) 5 A. & E. 261.

(b) 1 A. & E. 232, 236.

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room to which access could be gained only by the passage used in common by the two tenants, constituted a separate and distinct dwelling house. *Blackburn J.* In *Monks v. Dykes* (a), it was held that a lodger, occupying one room in a house, the key of the outer door being kept by the landlord, could not justify, as being in possession of a dwelling house, turning out one who disturbed him in his possession. So, here, *Kirkup*, as well as the pauper, having a key of the front door, and each of them keeping clean the passage which they used in common, how can it be said that there was any separate and distinct dwelling house in the possession of the pauper ?] The entrance from the passage into the shop and other rooms in the pauper's occupation was exclusively appropriated to him. *Rex v. Henley upon Thames* (b) may be relied upon by the other side ; and is apparently in their favour. But the Court there gave no reasons for their decision ; and *Rex v. Great and Little Usworth and North Biddick* (c) was not cited.

(*A. Liddell*, contra, was not called upon.)

COCKBURN C. J. We are all agreed that there was in this case no such renting of a tenement by the pauper as would confer a settlement under stat. 6 G. 4. c. 57. s. 2. The case which Mr. *Davison* has cited shews that a house may be so divided and apportioned between several tenants, each having a separate entrance to his portion, as practically to become several houses ; by renting each of which, respectively, a settlement may be gained : provided that the severance of each portion is made complete by the appropriation to the tenant of it

(a) 4 M. & W. 567.

(b) 6 A. & E. 294.

(c) 5 A. & E. 261.

of an exclusive entrance, to the use of which other persons are not entitled. But, in the present case, no such exclusive entrance was appropriated to the pauper; the entrance by the front door of the house being used, in common with him, by another tenant. The case, therefore, does not fall within the principle of the decision upon which Mr. *Davison* relies.

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WIGHTMAN J. I am of the same opinion.

HILL J. I am of the same opinion. I have already read the dictum of *Patteson J.* in *Rex v. Wootton* (a). The judgment of *Littledale J.* in *Rex v. Great and Little Usworth and North Biddick* (b) proceeds on the same principle. He says: "There were in this house three floors, and the access to each was by separate outer doors; I think therefore that each was" "a separate and distinct dwelling house within the statute." In the present case, the access to the floor occupied by the pauper was not by a separate outer door.

BLACKBURN J. I am of the same opinion. The test whether a part of a house is to be deemed a separate and distinct dwelling house, appears to be whether it has a separate and distinct outer door; and the floor occupied by the pauper did not satisfy that test.

Order of Sessions quashed.

(a) 1 A. & E. 232. 236.

(b) 5 A. & E. 261.

1860.

Wednesday,
November 28th.

LOOME, appellant, *against* BAILY, respondent.

Stat. 1 & 2
W. 4. c. 32.
s. 4. imposes
a penalty upon
any licensed
dealer in
game who
buys, sells,
or knowingly
has in his
possession or
control, any
bird of game
after the ex-
piration of ten
days from the
respective
days in each
year on which
it shall be-
come unlawful
to kill or take
such birds of
game respec-
tively: and
upon any
person not
licensed to
deal in game,
who buys or
sells any bird
of game after
the expiration
of the same
period, or who
knowingly has
in his posses-
sion or control
any bird of
game (except
birds of game
kept in a mew
or breeding
place) after
the expiration of forty days from the respective days on which the season for lawfully
killing such birds ends.

CASE stated by a Metropolitan police magistrate,
under stat. 20 & 21 *Vict. c. 43.*

John Baily, the respondent, of 113, *Mount Street, Grosvenor Square*, in the county of *Middlesex*, was summoned by the appellant, for that he, on 29th *March*, 1860, being then and there licensed to deal in game, according to stat. 1 & 2 *W. 4. c. 32. s. 19.*, did then and there unlawfully sell certain birds of game, to wit three pheasants, on the day last aforesaid, such day being after the expiration of ten days from 1st *February*, 1860; contrary to the 4th section of the said statute; whereby he had forfeited a sum not exceeding 3*l.*

The witness in the case stated that he called, on 26th *March*, 1860, at the shop of the respondent, who was then licensed to deal in game under the 19th section of the said Act; and asked to purchase some live pheasants; that the respondent asked the witness if he required wild pheasants, and, upon his replying "yes," the respondent said he should have to send to *Norfolk* for them, and the witness must call again on the *Thursday* following, 29th *March*. The witness went to the shop on the 29th, and again saw the respondent, who gave him the three pheasants, which he said were wild; and

Held, that throughout this section the words "birds of game" include live birds; and that a licensed dealer in game incurs the penalty by selling such birds after the expiration of the ten days specified by the statute.

thereupon the witness paid the respondent 2*l.* 5*s.*, taking away the birds.

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v.
BAILY.

Upon these facts, the counsel for the respondent submitted that the 4th section, under which the respondent was summoned, did not apply to live birds of game, but had in view only birds of game which were dead. He cited *Porritt v. Baker (a)*, and *Woolrych on the Game Laws*, p. 72. Yielding to the authority of that case the magistrate dismissed the summons.

Hawkins, for the appellant, in support of the summons. The magistrate was wrong in dismissing the summons. Sect. 4 of the Game Act, 1 & 2 *W.* 4. c. 32., makes it an offence for persons to buy, sell, or knowingly have in their possession, after the expiration of the specified periods, any bird of game, whether it be alive or dead. Sect. 2 defines "game" as including "hares, pheasants, partridges," &c.; nothing being added as to whether live or dead animals are intended. Sect. 3 shews that live game were meant to be included. It fixes the days and seasons during which game may not be killed; the season, so far as regards pheasants, being between 1st *February* and 1st *October*. Sect. 17 empowers persons who have taken out game certificates, to sell game to any person licensed to deal in game, under sect. 18; and by sect. 19 any such last mentioned person is required to take out a dealer's certificate. Sect. 4, which is here material, enacts "That if any person licensed to deal in game by virtue of this Act" "shall buy or sell, or knowingly have in his house, shop, stall, possession, or control, any bird of game after the expiration of ten

(a) 10 *Exch.* 759.

1860. days (one inclusive and the other exclusive) from the
LOOME
v.
BAILY. respective days in each year on which it shall become
unlawful to kill or take such birds of game respectively
as aforesaid; or if any person, not being licensed to
deal in game by virtue of this Act" "shall buy or sell
any bird of game after the expiration of ten days (one
inclusive and the other exclusive) from the respective
days in each year on which it shall become unlawful to
kill or take such birds of game respectively as aforesaid,
or shall knowingly have in his house, possession, or con-
trol, any bird of game (except birds of game kept in a
mew or breeding place) after the expiration of forty days
(one inclusive and the other exclusive) from the respec-
tive days in each year on which it shall become unlaw-
ful to kill or take such birds of game respectively as afore-
said; every such person shall, on conviction of any such
offence" "forfeit and pay for every head of game so
bought or sold, or found in his house, shop, possession, or
control, such sum of money, not exceeding 1*l.*, as to the
convicting justices shall seem meet, together with the
costs of the conviction." There is nothing in this
enactment to limit the meaning of the expressions
"bird of game" and "head of game" to dead birds of
game. Taking the whole section together, it is clear
that the Legislature intended to guard against any inter-
ference with live birds during the close or breeding
season, no less than against their destruction during that
season. Accordingly the section, after enacting that no
licensed dealer in game may buy, sell, or knowingly
have in his shop or possession any bird of game after
the expiration of ten days from the end of the shooting
season, and that no other person may deal in game after
the expiration of the same period, goes on to prohibit

all such other persons from having in their possession any bird of game (except birds of game kept in a mew or breeding place) after the expiration of forty days from the end of the shooting season. The exception just referred to shews plainly that the Legislature had live birds in its contemplation. [*Wightman J.* You contend that licensed dealers in game may have birds of game, whether alive or dead, in their possession for ten days only after the close of the shooting season; and that other persons, after forty days from that time, may have birds of game in their possession only if alive and in a mew.] That is the true construction of the section. In *Rex v. Marsh* (a) the defendant was held properly convicted, under stat. 5 Ann. c. 14. s. 2., which mentions "game" only, for having in his possession a quantity of live game. So, in *Helps v. Glenister* (b), it was held that stat. 58 G. 3. c. 75. which, in general language, made the buying of game an offence, prohibited the buying of pheasants in all cases: and that, therefore, by a contract for the sale of live pheasants, no property passed to the purchaser. The decision in *Porritt v. Baker* (c) turned upon the form of the plea; which was held bad, as not necessarily shewing a contract rendered illegal by stat. 1 & 2 W. 4. c. 32. If that case is to be taken to have decided that sect. 4 of that Act applies only to dead game, it cannot be supported. If live game be not within the section, a dealer in game might buy any number of live partridges from poachers on the 31st of *August*, and kill and sell them on the 1st of *September*, without in any way contravening the Act.

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v.
BAILLY.

(a) 2 B. & C. 717.

(b) 8 B. & C. 553.

(c) 10 Exch. 759.

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 v.
 BAILY.

Lush, contra (called upon by the Court). The case, no doubt, falls within the literal words of the statute, taken in their most general acceptation; but the justice of the case requires that they should receive a limited meaning, and be taken to refer to dead game only. Several cases, decided under earlier statutes in *pari materia*, shew how such Acts ought to be construed. Thus in *Simpson v. Unwin* (a), it was held that a person who had in his possession, on the 9th of *February*, partridges and a pheasant killed before the 1st, was not guilty of any offence against stat. 2 *G.* 3. c. 19. ss. 1 and 4., which imposed a penalty on any person who should, after the 1st of that month, kill or have in his possession such game. So again, in *Bridger v. Richardson* (b), it was held that stat. 3 *Jac.* 1. c. 12, which prohibited persons from willingly taking, destroying, or spoiling any spawn of fish, meant thereby a taking for destruction, and not a taking for the purpose of removing the spawn to beds, for further growth and maturity, to make it marketable. So, in the Act now in question, "take" must mean "take for the purpose of destroying," and does not apply to a taking for purposes of breeding. [*Blackburn J.* Throughout the section the words "kill or take" occur together. If "take" has the meaning for which you contend, "kill" would have been sufficient to include it.] A poacher might take birds alive and hand them over to a dealer to be killed. [*Wightman J.* I doubt whether the Legislature intended to provide for the case of a taking of game by hand.] *Porritt v. Baker* (c) is in the respondent's favour. [*Blackburn J.* That case does not go far enough for your purpose.]

(a) 3 *B.* & *Ad.* 134.(b) 2 *M.* & *S.* 568.(c) 10 *Exch.* 759.

(COCKBURN C. J., was absent.)

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WIGHTMAN J. I entertain no doubt whatever but that the words "birds of game" in stat. 1 & 2 *W.* 4. c. 32. s. 4. include live birds. The words must have the same meaning throughout the section, and the reference in its second clause to "birds of game kept in a mew or breeding place" shews plainly that the Legislature had live birds in view. I do not see that *Porritt v. Baker* (a) touches the present case.

HILL J. and BLACKBURN J. concurred.

Case sent back to the magistrate for rehearing.

(a) 10 *Exch.* 759.

END OF MICHAELMAS VACATION.

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CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

HILARY TERM,

XXIV. VICTORIA.

The Judges who usually sat in Banc in this Term
were:

COCKBURN C. J.		CROMPTON J.
WIGHTMAN J.		HILL J.

*Saturday,
January 12th.*

The QUEEN, on the Prosecution of The EASTERN
COUNTIES Railway Company, appellants, *against*
The Overseers of the Poor of the Parish of
FLETON, respondents.

Appellants,
a railway
Company,
being the sole
proprietors

AT the *Huntingdonshire* Quarter Sessions held in
January, 1860, on an appeal by *The Eastern*
and occupiers of a railway station on their line, in 1848 entered into an agreement with
another railway Company, by which the latter were, for a certain annual payment, to
have for 999 years the joint use of the station for their traffic, appellants continuing to
be occupiers of the station, subject to such use. In 1859, the annual value of the station

Counties Railway Company against a poor-rate for the parish of *Fletton*, in that county, made on 17th *August*, 1859, in and by which the Company were rated and assessed in respect of certain lands and premises in *Fletton*, whereof they were described as owners and occupiers, on a rateable value of 1889*l.* 15*s.*; the Sessions amended the rate by reducing the said rateable value to the sum of 635*l.*, subject to the opinion of this Court on the following case.

The rate was duly appealed against by *The Eastern Counties Railway Company*, on the ground that they were overrated therein, and that certain other persons to whom notices of appeal were also given were underrated therein. The rate was not appealed against on the ground that any persons were omitted from the rate who ought to have been included therein and rated thereby; and the only grounds of appeal material to this case were the following, namely: Secondly. That the said rate or assessment, as against and as regards the said Company, is bad and of no force or validity, inasmuch as it was not, nor is it, so far as the same relates to the said Company and their assessment therein, made upon an estimate of the net annual value of the railway lands, station, tenements, hereditaments and premises, occupied by the said Company in the said parish of *Fletton*, and in respect of which they are rated and assessed in the said rate or assessment, (that is to say) upon an estimate of the rent at which the same might reasonably be expected to let from year to

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having then from various causes fallen very much below the sum paid annually to appellants, under this agreement, by the other Company, appellants were assessed to a poor-rate in respect of the station, on the full sum so paid to them.

In a case stated for this Court, on an appeal by appellants to Sessions against this rate, on the ground that the rateable value of the station was not the rent actually paid but the rent which could be actually obtained for it from a hypothetical tenant from year to year, it was stated as an admitted fact that appellants were the persons rateable in

respect of the whole occupation of the station. Held, that appellants were properly rated on the full amount paid by the other Company; appellants being sole occupiers of the station, subject to an easement by the other Company, and the payment being a profit arising out of appellants' occupation.

1861. year, free of all the usual tenant's rates and taxes, and tithe commutation rent charge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses (if any) necessary to maintain them in a state to command such rent, according to the provisions of the statute in that case made and provided : but the said rate or assessment, so far as the same relates to the said Company and their assessment therein, was and is made upon an estimate of more than the net annual value of the said railway lands, station, tenements, hereditaments and premises, occupied by the said Company in the said parish of *Fletton*. Thirdly. That the said *Eastern Counties Railway Company* are, in and by the said rate and assessment, overrated and over assessed in respect of the property and premises occupied by them in the said parish of *Fletton*, in respect of which they are rated and assessed in the said rate or assessment ; and are rated and assessed in the same rate or assessment at and upon a greater sum and sums than they ought to have been, or to be, rated or assessed at or upon in the said rate or assessment.

At the trial, the contest was confined to the assessment of the property hereinafter called "The Station," and named in the rate "*Eastern Counties Railway Station, &c.*" The station consists of between twenty and thirty acres of land in the parish of *Fletton*, of which the appellants were and are the owners. It is bounded on one side by the navigable river *Nene*, and comprises station buildings, platforms, sheds, sidings, and all other descriptions of accommodation proper to railway stations, and for the most part expressly named

in the rate (a). The appellants were and are in occupation of a great part of it, and for the purposes of this case are to be deemed to be the persons rateable in respect of the whole occupation.

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Prior to the month of April, 1848, and up to and at the time of the making of the agreement next hereinafter mentioned, there existed great competition between the appellants and *The London and North-Western Railway Company*, for the traffic in goods and passengers between *Peterborough* and *London*, and between *Peterborough* and places to the north and east of *Peterborough*. *The London and North-Western Railway Company* at that time used a portion of the station in question, in part exclusively, and in part jointly with the appellants.

On 15th *April*, 1848, the appellants and *The London and North-Western Railway Company* entered into an agreement by deed, between the appellants of the first part, and *The London and North-Western Railway Company* of the second part. This deed recited that the two Companies had constructed and opened for traffic railways to *Peterborough*, in continuation of their respective lines from *London*; that the station at *Peterborough*, used in common by them, had been erected at the sole expense of the appellants, and a portion of the line leading to such station, about (b) chains in length, over which the traffic of *The London and North-Western Company* to and from *Peterborough* was carried, was the

(a) The description of the property in the rate was as follows: "The *Peterborough* railway station, platform, sheds, machines, wharf, sidings, electric telegraph office and wires, main line of railway, thirty chains in length, cattle pens, workshops, roads, garden land, and fifteen houses and cottages occupied by the Company's servants, &c."

(b) Sic.

1861. sole property of the appellants; that such last mentioned
The QUEEN portion of line, and the said station, had for some time
v. past been used by *The London and North-Western Rail-*
FLETTON. *way Company*, and arrangements had also been made
between the two Companies for the future conduct of
the *Peterborough* traffic with the Metropolis, in order to
insure every proper accommodation to the public; and,
that the Companies had, in reference to all such arrange-
ments, agreed to enter into the terms and stipulations
thereinafter contained. It then witnessed "That, in con-
sideration of the premises, the said two Companies do
mutually covenant and agree with each other as follows
(that is to say):

First. That the said Company of the second part shall,
paying the rents and performing the conditions of this
agreement, be entitled to use the said station and portion
of line aforesaid, jointly with the said *Eastern Counties*
Railway, for the term of 999 years, for which term of
years this agreement shall subsist and continue, and be
in full force and effect, and binding upon both the said
Companies in respect of all the terms and stipulations
thereof.

Second. That the said Company of the second part
shall, for the said portion of line and station, pay
annually, by half yearly payments on the 1st *July* and
1st *January*, the following rent and expenses (that is to
say), first, Such sum annually as shall be equal to one
mile's gross earnings, after deducting forty per cent.
thereof to cover all expenses for each year, upon that
portion of *The London and North Western-Railway* which
lies between the *Peterborough* and *Sibson* Stations:
second, Such sum annually as shall be equal to five per
cent. per annum upon the costs of the land and buildings

to be occupied exclusively by the said Company of the second part : third, Such sum annually as shall be equal to seven per cent. per annum upon one half of the outlay of the station and buildings jointly used by the said two Companies, with the exception of land, and as shall be equal to five per cent. upon the land occupied by such jointly used station and buildings : fourth, One moiety of the expenses of the management and conduct of the said joint station : fifth, That the said Company of the second part shall keep in repair, at their own expense, so much of the said station and buildings as they shall exclusively occupy as aforesaid, and shall repay the said Company of the first part all the outlay they have made upon internal fittings : sixth, That the said Company of the first part shall keep in repair, at their own expense, the station and buildings to be jointly used, and shall manage and conduct the affairs and business of the said joint station, and shall deliver an account, half yearly, to the said Company of the second part of the expenses of such management ; and that the said Company of the first part shall provide the same amount of accommodation, in all respects, for the said Company of the second part, as for themselves, and act with impartiality in the management of the said station : seventh, That the receipts for the through passenger and goods and cattle traffic between *Peterborough* and *London*, whether passing over the *Eastern Counties* or the *London and North-Western Railway*, shall be equally divided each half year between the two Companies, and separate accounts shall be kept of such passenger traffic, and of such goods and cattle traffic ; and that there shall be allowed to the Company who shall carry the larger proportion of passenger traffic, a sum equal to ten

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per cent. upon the excess of the passenger traffic of the one Company over the like traffic of the other Company ; and to the Company who shall carry the larger proportion of goods and cattle traffic, a sum equal to twenty per cent. upon the excess of the goods and cattle traffic of the one Company over the like traffic of the other Company ; the amount of such goods and cattle traffic in the case of each Company being made up and calculated exclusive of all charges for collection, cartage and delivery.”

(The remainder of the deed is not material.)

The station at *Peterborough*, used in common by the said two Companies, as mentioned in the said agreement, is “The Station” named in the rate ; and ever since the execution of the said agreement the same has been, and still is, in force and effect, and the occupation of the station has been in fact under and in conformity with the said agreement ; and, leaving out of consideration the sum receivable by the appellants in respect of the portion of the line described in the recital of the said indenture as “a portion of the line leading to such station,” on which, for the purposes of this case, nothing turns, the sum annually receivable by the appellants from the *London and North-Western Railway Company*, under the said agreement, and charged in their published accounts to their credit as so receivable (and which, in fact, has been in part received, and no reason has been assigned in the said accounts, or was alleged at the trial, why the remainder should not be received, except that at the trial it was sworn that the *London and North-Western Railway Company* had refused to pay the same), has annually amounted and still amounts, after deducting the expenses of the management and conduct of the

said joint station, to 5084*l.* 3*s.* 1*d.*; that is to say, to 1735*l.* 10*s.*, being a sum equal to 5*l.* per cent. per annum upon the cost of the land and buildings exclusively occupied by the *London and North-Western Railway Company*, and to 3348*l.* 13*s.* 1*d.*, being a sum equal to 7*l.* per cent. per annum upon one half of the outlay of the station and buildings jointly used by the said two Companies, and 5*l.* per cent. per annum upon the land occupied by such jointly used station and buildings.

For the purposes of the case the following statement was to be taken as true.

Up to the year 1850, a very large traffic, both in passengers and goods, from *Peterborough* and the *North-Eastern* and *Midland Counties*, was carried to *London* by the *Eastern Counties Railway*; with a view to which traffic the station was laid out and erected by the appellants. The traffic from these districts was brought on to the *Eastern Counties Railway* at *Peterborough*, by the *Great Northern Railway* (which did not then extend towards *London* further than *Peterborough*); by the *Peterborough* and *Syston* branch of the *Midland Railway*; and by the *London and North-Western Railway*. In the year 1850, the *Great Northern Railway* was opened from *Peterborough* to *London*, by a route which was shorter than that of the *Eastern Counties Railway* by twenty-six miles. Immediately upon the opening of the *Great Northern Railway*, all the passenger traffic and a large portion of the goods traffic between *Peterborough* and *London* was diverted from the *Eastern Counties Railway* to the *Great Northern Railway*. Goods, however, were still brought on to the *Eastern Counties Line* at *Peterborough*, by the *Midland Railway Company*, until the year 1857, when, by the opening of

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the *Leicester and Hitchin Railway*, the *Midland Railway Company* obtained an independent route to *London*, and accordingly ceased to send goods from *Peterborough* to *London* by the *Eastern Counties Railway*. In 1858, the *Welwyn and Hertford* branch line was opened, by which the traffic at *Peterborough* was still further diminished; and since that year (with the exception of coals as hereinafter mentioned), the traffic at *Peterborough* of all kinds, so far as the appellants are concerned, has been entirely confined to the short local traffic. For the purpose of such traffic, an ordinary road side station would be sufficient; and, in consequence of this diminution in the traffic, a large repairing shop and other buildings at the station in question have been taken down, and others have been allowed to fall into decay. The *Great Northern Railway Company* have an entirely separate station at *Peterborough*, for the purposes of their own traffic. Between *Peterborough* and *Ely*, to which branch the station in question belongs, the traffic is so small that the branch is worked at a loss by the appellants. There is a considerable coal traffic belonging to the appellants, passing through the station. There is no depôt of coals there, but the sidings are made use of for the purpose of shunting the trains, and additional sidings have from time to time been laid down for this purpose. There is a great competition between the railway Companies for this coal traffic, and the rates are low, and this branch of the traffic only becomes profitable when the coals are carried in large quantities and for long distances. The buildings comprised in the station are now used in many cases for purposes entirely different and inferior to that for which they were originally erected, the offices intended for passenger traffic

being used for store rooms and other similar purposes. To an ordinary tenant, for any other purpose than that of a railway, the station would be of no annual value, if he were bound to maintain the buildings in a state of repair.

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At the trial of the appeal, the annual rateable value of the station, as used for the purposes of a station and for the purposes to which it was in fact applied, after making all deductions, was estimated by the witnesses called by the appellants at sums not exceeding 635*L*, but those witnesses in ascertaining the said annual rateable value did not take into account the said annual sum receivable by the appellants from the *North Western Railway Company* under the said agreement, or any part thereof.

It was contended for the appellants that the said annual sum had been agreed upon, in 1848, under a different state of circumstances, for the objects mentioned in the agreement; and ought not to be taken into account in ascertaining the annual rateable value of the station, or the sum at which it would now let to a tenant from year to year. And that the appellants were not, and are not, by law, liable to be assessed to the rate in respect of or upon that sum or any part of it.

The respondents contended that the hypothetical tenant from year to year contemplated by stat. 6 & 7 *W.* 4. c. 96. must be supposed to be placed in the same position as the appellants in respect of the payment made under the agreement, such payment arising necessarily out of the occupation. That if the tenant would be entitled to the payment, it would enhance the amount of the rent which as tenant from year to year he would be willing to offer for the station; and that, therefore, the

1861. appellants were by law liable to be assessed to the rate
 in respect of or upon such payment.
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The Sessions were of opinion that the annual rateable value of the station, not estimating the payment from *The North-Western Railway Company*, was 635*l.*, and they ordered the rate to be amended by substituting in it the sum of 635*l.* for the sum of 1889*l.* 15*s.*

The question for the Court was whether the sum of money payable to the appellants, under the agreement of 1848, by *The London and North-Western Railway Company*, ought to form part of the rateable value of the station.

If the Court should answer the question in the negative, the order of Sessions was to be confirmed, and the rate to stand amended; if in the affirmative, the order of Sessions was to be quashed, as to the substitution therein of 635*l.* for 1889*l.* 15*s.*, and the said sum of 1889*l.* 15*s.* was to remain in the rate.

Bovill and Markby, for the appellants (a). The Sessions were right in not taking into account the payments made to the appellants under the agreement of *April*, 1848, as enhancing the rateable value of the appellants' station. The appellants ought to be rated on the present rateable value of the station; and the criterion of that value is not the amount which the appellants now receive, under the agreement, from *The London and North-Western Railway Company*, for its use, but the rent which they could now obtain for it from a tenant from year to year; which rent would fall greatly short of the sum now in fact annually paid to the appellants. Although that payment is some evidence of the rent at

(a) *Saturday, November 10th, 1860.*

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which the station might reasonably be expected to let to a tenant from year to year, it is not the proper criterion of the rateable value, which depends upon the present annual value of the station; *South-Eastern Railway Company v. Overseers of Dorking* (a), *Regina v. Eastern Counties Railway Company* (b). And the circumstances stated in the present case shew that no such a rent would now be obtainable. The appellants, though occupiers of the rated property, receive the payment under the agreement, not as occupiers but as proprietors; the payment, that is to say, is not received in respect of their occupation at all. Were they to go out of occupation of the whole of the station to-morrow, they would still be entitled to the payment, which is analogous to a personal annuity. In *Newmarket Railway Company v. St. Andrew's the Less, Cambridge* (c), the majority of this Court held that a payment to one railway Company by another, under agreement, of such a sum, if any, as may be necessary to make up a certain dividend on the cost of the line, in consideration of the making of a part of it, and of working it for the benefit of the latter Company, is not a profit arising out of the occupation of the railway, and is not to be taken into account in assessing its rateable value. [*Blackburn J.* In that case Lord Campbell C. J. differed from *Coleridge* and *Erle J.*s, and thought that the sum paid under the guarantee was received by the *Newmarket* Company in respect of their occupation of their railway, and was part of the profits of that occupation.] In *Rex v. Bedworth* (d) it was held that where a coal mine, becoming unproductive,

(a) 3 E. & B. 491.

(b) 23 L. J. N. S. M. C. 96, note (18).

(c) 3 E. & B. 94.

(d) 8 East, 387.

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ceases to be worked, the lessee is no longer liable to be rated for it to the relief of the poor, although he be still bound by his covenant to pay the rent reserved to his landlord. In the present case the liability of *The London and North-Western Railway Company*, under their covenant, to pay the appellants the sum stipulated in the agreement, is as independent of the occupation of the station, as if the station had altogether ceased to be occupied.

Keane, Metcalfe and Douglas Brown, contra. By the agreement, the annual payment is secured to the appellants for 999 years; for the whole of which time they are thus protected against any depreciation in the annual value to them of the station. It is not, therefore, open to them to say that circumstances have altered that value since the agreement was entered into. [*Blackburn J.* It is possible for the two Companies at any time to agree that the payment shall cease.] Decided cases, as was said by the Court in giving judgment in *Rex v. The Proprietors of the Liverpool Exchange* (a), "establish the principle, that the advantages attendant upon a building, either in respect of its situation or the mode of its occupation, are to be taken into the account in estimating its rateable annual value, wherever those advantages would enable the owner of the building to let it at a higher rate than it would otherwise fetch." Taking that as the test, the appellants, were they now to let the whole of the station to a tenant from year to year, would obtain from him a higher rent than it would otherwise fetch, by reason of the payment which *The London and North-Western Company* is bound to make annually in respect of it.

(a) 1 A. & E. 465, 474.

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[*Blackburn J.* You assume that a tenant from year to year would be entitled to receive that payment.] At all events, the payment is part of the profits of the appellants' occupation of the station. The judgment of Lord Campbell C. J. in *Newmarket Railway Company v. St. Andrew's the Less, Cambridge* (a), is directly in favour of the respondents; and the law laid down by him was not questioned by the other Judges, who differed from him only as to the construction to be put upon the agreement which was in question. In *Allison v. Overseers of Monkwearmouth Shore* (b), it was held that the occupier of a brewery under a lease, by which the custom of several public houses, belonging to the owner of the brewery, was secured to him, he paying an annual sum in respect of this advantage, which enhanced the value of the brewery to him, was properly rated on the enhanced value, it being an advantage connected with the occupation, which would be taken into calculation by a tenant in estimating the annual rent.

Cur. adv. vult.

COCKBURN C. J. now delivered the judgment of the Court (c).

This was a case stated for the opinion of the Court, by the Court of Quarter Sessions for the county of *Huntingdon*, on an appeal by *The Eastern Counties Railway Company* against a rate made on them in respect of their railway station at *Peterborough*. The facts, so far as they are material, are shortly as follows. *The Eastern Counties Railway Company*, being the sole proprietors of the station in question, in the year 1848

(a) 3 E. & B. 94.

(b) 4 E. & B. 13.

(c) Cockburn C. J. and Blackburn J.

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tenant from year to year, coming in in their place, would pay as rent for the use of the station. But *The London and North-Western Company* are not occupiers of the station at all; they have only an enjoyment by way of user; in other words, an easement. The occupiers are *The Eastern Counties Company*, subject to the easement of the other Company; and the true question is, what would a tenant, coming into the place of *The Eastern Counties Company*, give for such occupation? Now, it is plain that a tenant coming into their place, in considering what rent he would give after the necessary deductions, would take into account, as increasing the value of the premises, the amount to be annually paid by *The London and North-Western Railway Company* for their use of the station. It is true *The Eastern Counties Company*, if they were to let the station, though they could, of course, only let it subject to the right of *The London and North-Western Company* to use it, might, taking a lower rent from their immediate lessee, reserve to themselves the receipt of the amount annually payable by *The London and North-Western Company*. Whether under such circumstances, they would or would not still remain liable as occupiers, quoad a moiety of the line, *The London and North-Western Company* having only an easement therein, it is unnecessary to decide. It is sufficient, in our opinion, for the present purpose, to say that, rebus sic stantibus, they are assessable to the full amount of what they receive. The true principle, according to which the value of the occupation to the hypothetical tenant contemplated by The Parochial Assessment Act is to be estimated, is, to assume the continuance of those circumstances which constitute the value to the existing occupier, unless it be made to appear that those circumstances are about

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to undergo a change. But there is nothing in the present case to lead to the supposition that *The Eastern Counties Company* will either forego their right under a very advantageous agreement, which is to bind *The London and North-Western Company* to a very remote future, or that *The Eastern Counties Company* will either let the station to any other occupier, or, if they do, will place such occupier, relatively to the other Company, in a different position from that in which they themselves stand. It will be time enough to deal with such altered circumstances when they arise. At present *The Eastern Counties Company*, as occupiers of this station, derive a profit not only from their own use of the station, but also in respect of the sum annually paid by *The London and North-Western Company* for their use of it; and they ought in justice to contribute to the local burdens in proportion to the entire benefit which they derive from the occupation; and we think that they fail legally, as they certainly do morally, in the attempt to withdraw themselves from such fair and equal contributions.

The order of Quarter Sessions must, therefore, be quashed, and the rate will stand according to the original assessment.

Order of Sessions quashed (a).

(a) *Bovill* subsequently, on *Saturday, January 26th*, asked leave to mention this case, on the ground that the judgment had possibly proceeded on a misapprehension of the facts; and he called attention to the clauses in the agreement by which it appeared that the *London and North-Western Company* were to have exclusive occupation of part of the station, and to the statement in the case that the occupation had in fact been under and in conformity with the agreement. But *Cockburn* C. J. said that there had been no misapprehension, and that the judgment was based on the statement in the case that, for the purposes of the case, the appellants were to be deemed to be the persons rateable in respect of the whole occupation.

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BENNETT *against* GRIFFITHS and another.Saturday,
January 12th.

GRAY, in last *Michaelmas* Term, moved for a rule calling on the plaintiff to shew cause why an order of *Blackburn J.* for the inspection of a mine of the defendants should not be set aside.

It appeared from the affidavits that the plaintiff was the owner of certain coal mines situate at *Titford*, near *Oldbury*, in the county of *Worcester*, containing an area of forty acres or thereabouts. The defendants were the lessees and occupiers of other mines adjoining to the said mines of the plaintiff, and which the defendants were engaged in working at the time the said order was made. The plaintiff having cause to believe that the

The Common Law Procedure Act, 1854, 17 & 18 *Vict. c. 125*, s. 58., enacts that "either party" to an action "shall be at liberty to apply to the Court or a Judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property the inspection of which may be

material to the proper determination of the question in dispute; and it shall be lawful for the Court, or a Judge, if they or he think fit, to make such rule or order, upon such terms as to costs and otherwise as such Court or Judge may direct."

Held, that this section gives, as ancillary to the power to order inspection, the same power to order the removal of obstructions, with a view to inspection, which is exercised by the Courts of equity as ancillary to their power of ordering inspection.

Plaintiff and defendants were adjacent mine owners. Plaintiff having reason to believe that defendants had encroached upon his mine, obtained permission from them to make an inspection of their mine, when he found a recently erected wall at the boundary between the two mines, which prevented him from ascertaining whether defendants had encroached upon his mine or not. Application by him to defendants for permission to take down a portion of this wall in order to complete the inspection having been refused, plaintiff applied to a Judge at Chambers, under the above section, for an order for inspection. The Judge, upon being satisfied that a portion of defendants' wall could be safely removed, and an inspection behind it made without danger to life, and with no further detriment to defendants than a temporary suspension of their works, made an order that plaintiff should inspect defendants' mine at and behind the wall, and should be at liberty, so far as was necessary for the purpose of the inspection, to make a drift-way through the wall; before making the inspection giving security to the satisfaction of the master to the extent of 500*l.*, or depositing that sum with the master, to abide any order the Court might make as to indemnifying defendants from any loss or damage they might sustain in consequence of the inspection.

Held, refusing a motion on behalf of defendants for a rule calling on plaintiff to shew cause why this order should not be set aside, that the order was good, and not in excess of the Judge's jurisdiction under the statute.

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defendants had encroached upon his mine, applied to them, on 2nd *October*, for permission to make an inspection of their mine. On 26th *October* a mine agent, employed for the purpose by the plaintiff, was allowed to go down into the mine, when he found that the defendants were working and getting a measure called the "thick coal." He made his survey from the pit shaft, along a gate road, to the boundary of the plaintiff's mine; and at the boundary he found a recently erected wall or building, which, according to his affidavit, divided the mines of the plaintiff from the mines of the defendants, and extended thirty yards or thereabouts. Application was made to the defendants to allow this wall to be taken down, in order that the plaintiff's agent might see whether or not any encroachment had been made beyond it; but the defendants refused to allow that to be done. There were no means by which it could be ascertained whether such an encroachment had taken place, except by taking down a portion of the wall and driving a gate road through it, or by making a road from the plaintiff's own mines at an expense of about 1000*l*. The time occupied in the latter process would be about six months. The plaintiff had reason to believe that about 1000 square yards of his coal had been taken away by the defendants. On the part of the defendants it was sworn that it would be injurious to their mines if a gate road were driven through the wall; that the wall which had been erected was only the usual and proper wall, erected for the purpose of strengthening the gate road in that portion of the mine, and that the workings had been confined to the getting of coal within their own boundaries. A summons had previously been obtained for an inspection

of the defendants' mines, and, under the state of things above set out, *Blackburn J.* made an order that that summons should be adjourned for a week, to procure a report from the inspector of mines as to the practicability, especially with reference to the safety of the mine, of making an inspection behind the wall mentioned in the affidavits; the plaintiff undertaking to abide by any order the Court might make as to paying expense or loss incurred during his inspection. In obedience to this order, the inspector of mines for the district was allowed to go down into the defendants' mines on 13th *November*, but he was unable to make a satisfactory examination, in consequence of the damp in the mine. The defendants refused to allow any person employed by the plaintiff to go into the mine with the inspector, although the latter informed them that his inspection would not be satisfactory unless that was done.

On 16th *November*, *Blackburn J.* made an order, further adjourning the summons, and ordering that the defendants should give to the inspector all such facilities as he should require, including permission for such persons as he should think fit to accompany him for the purpose of the inspection.

On 20th *November*, the inspector made his report, to the effect that an inspection could be made behind the wall, either by making a headway in the solid coal, near the wall, or by removing a portion of the wall itself, which consisted chiefly of short round timber, longitudinally packed; that a portion of the return air-current from the workings might be diverted, and safely used by the plaintiff for the purpose of ventilating such workings as might be deemed expedient for such inspection. He further reported that no practical difficulty existed, cal-

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1861. culated to endanger the lives of the workmen employed ;
BENNETT and that the inspection sought by the plaintiff was not
V. likely to prove detrimental to the present or future
GRIFFITHS. workings of the mine, beyond a temporary suspension
 of the works of the defendants.

BLACKBURN J. then made an order "that the plaintiff be at liberty, by his witnesses, workmen and agents, to inspect the defendants' mine, at and behind the wall in the affidavits and the inspector's report mentioned ; that for this purpose the defendants give all reasonable facilities for access to and in the mine, and for ventilation during the process ; and that the plaintiff be at liberty, so far as is necessary for the purpose of the inspection, to make a driftway, as described in the inspector's report. That, before commencing the inspection, the plaintiff give security to the satisfaction of the Master, to the extent of 500*l.*, or deposit that sum with the Master, to abide any order the Court may make as to indemnifying the defendants for any loss or damage which may be sustained in consequence of this inspection."

Gray, for his rule (a). The defendants do not dispute the propriety of *Blackburn J.*'s order, or the justice of its terms ; but they submit that he had no jurisdiction to make it. Sect. 58 of The Common Law Procedure Act, 1854, 17 & 18 *Vict. c.* 125., enacts that "either party shall be at liberty to apply to the Court or a Judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal

(a) *Monday, November 26th, 1860.*

property the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the Court, or a Judge, if they or he think fit, to make such rule or order, upon such terms as to costs and otherwise as such Court or Judge may direct." [Blackburn J. I thought that, as that section empowers the Judge to order inspection of property, it gives him, by implication, authority to order all things ancillary to the inspection to be done. I believe that the Courts of equity exercise such a jurisdiction.] The section contains no reference to the practice of the Courts of equity; differing in that respect from stat. 14 & 15 Vict. c. 99. s. 6. which empowers the common law Courts to compel inspection of documents whenever equity would grant a discovery. The Legislature would have referred to the practice of equity in the one case as in the other, had they intended it to be taken as a guide. [Cockburn C. J. The word "inspection" may have acquired a meaning in the Courts of equity, and may be used in that meaning in sect. 58 of The Common Law Procedure Act, 1854. Hill J. Assuming, as appears not improbable, that the defendants have purposely constructed the wall for the express purpose of preventing the inspection, do you contend that the Court is powerless to defeat them in that design?] The argument for the defendants must go to that extent; no provision has been made by the Act for such a state of things. *Patent Type Founding Company v. Lloyd* (a) is in point. In that case the Court of Exchequer refused an application by the plaintiffs in an action for the infringement of a patent for the making of type by a certain combination of

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(a) 5 H. & N. 192.

1861. metals, for liberty not merely to inspect the defendant's types, but to take specimens thereof, if necessary, for the purpose of analysis. The application was made under The Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83. s. 42., which, like the 58th section of The Common Law Procedure Act, 1854, merely empowers the Court to make an order for an inspection. If the present order is upheld, it is difficult to say what orders for the inspection of property may not be made. It is conceivable, for instance, that such an order might go the length of directing a house to be pulled down, and yet be valid. The safer construction of the statute is that it contemplates the ocular inspection only of property.

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Macnamara shewed cause in the first instance. It is not disputed by the other side that the Judge had power to order an inspection of the defendants' mine, in order that it might be ascertained whether or not they had encroached on the plaintiff's. But the inspection thus ordered must be an efficient inspection, or the order will amount to a nullity. In the present case, the inspection could be made only by taking down a part of the defendants' wall. The Judge had therefore jurisdiction to make an order to that effect. The case falls within the principle that, when anything is given by the law, that also is given without which the thing cannot be enjoyed. *Patent Type Founding Company v. Lloyd* (a), if in point, is distinguishable. There, the plaintiffs' application, if granted, would have involved the destruction of some of the defendant's property; here, the defendants will suffer nothing beyond a temporary inconvenience from

(a) 5 H. & N. 192.

the plaintiff's inspection of their mine, and the order carefully provides that for that they shall be compensated by the plaintiff. In the case in question, the Court of Exchequer thought the analysis of the type unnecessary to the inspection; but *Bramwell* B. admitted that there might be cases in which inspection of an article could not be had without consuming a portion of it. Sect. 58 of The Common Law Procedure Act, 1854, empowers the Judge to make the order upon such terms as he may direct. [*Blackburn* J. In *Attorney General v. Chambers* (a) the Master of the Rolls made an order that the Commissioners of Woods and Forests should have liberty to enter, inspect and examine the coal mines of the defendants, and to take all necessary steps for enabling them to make and perfect a complete survey.] The order now before the Court limits the plaintiff to doing no more than is necessary for the inspection.

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Gray was heard in reply.

Cur. adv. vult.

COCKBURN C. J. now delivered the judgment of the Court.

In this case the plaintiff, who is owner of minerals adjacent to a mine worked by the defendants, having reason for believing that the defendants had worked across the boundary and removed his coal, applied to them, on the 2nd of *October*, for leave to inspect their workings and ascertain if such was the fact. The agent of the defendants put off the inspection from time to time till the 26th of *October*, when he permitted the

(a) 12 *Beav.* 159.

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plaintiff's agent to descend into the mines and inspect them. The plaintiff's agent found the workings, as far as he could examine them, to be within the defendants' boundary; but at the boundary between the plaintiff's minerals and the defendants he found a newly erected wall extending for about thirty yards. If there was any encroachment at all, it must have been behind this wall. The plaintiff applied to the defendants for leave to take down part of this wall, so as to ascertain if there was any encroachment behind it, and was refused. He then applied at Chambers for an order, under the 58th section of The Common Law Procedure Act, 1854, to inspect the defendants' mine behind this wall, on affidavits shewing a *prima facie* ground for believing that there had been an encroachment behind it. Affidavits were used in opposition, in which it was strongly sworn that any meddling with this wall would produce very injurious effects on the defendants' mine, and be attended with great danger to those engaged in working it, but containing nothing to raise any doubt that the wall had been recently erected, and that an inspection beyond it would decide at once whether there had been an encroachment or not. The Judge at Chambers (*Blackburn J.*) made an order that the government inspector of mines should be permitted to examine this wall, and report on the practicability and safety of an inspection behind it. This order was at first baffled; but on a second and more peremptory order to the same effect, the government inspector of mines did examine it, and reported that an inspection could be made behind the wall, by certain means pointed out in the report, without any practical difficulty or any danger either to the lives

or health of the workmen employed in the said pits and workings, or with any likelihood of detriment to the present or future workings of the mine, beyond a temporary suspension of the works of the defendants for a few hours, or at most for a day. On this *Blackburn J.* made an order that the plaintiff, by his witnesses, workmen and agents, should be at liberty to inspect the defendants' mine at and behind the wall in the affidavits and the inspector's report mentioned; that for this purpose the defendant should give all reasonable facilities for access to and in the mine, and for ventilation during the process; and that the plaintiff should be at liberty, so far as was necessary for the purpose of the inspection, to make a driftway as described in the inspector's report; that before commencing the inspection the plaintiff should give security to the satisfaction of the master to the extent of 500*l.*, or deposit that sum with the master, to abide any order the Court might make as to indemnifying the defendants for any loss or damage which might be sustained in consequence of this inspection, the plaintiff undertaking to fulfil any order in that respect made by the Court. On the last day of last Term, Mr. *Gray* applied for a rule to set aside this order, against which cause was shewn in the first instance. No objection was made to the propriety of the order, or the justice of the terms contained in it, if the Judge had jurisdiction to make it; but it was contended that neither the Court nor a Judge had jurisdiction to interfere with the wall itself, or the defendants' minerals, for the purpose of making an inspection behind the wall. As this was the first instance, as far as we know, in which any question as to the extent of this new juris-

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diction in a Court of common law had been raised, the Court took time to consider.

We are of opinion that the Judge had jurisdiction to make the order in question. The power to order an inspection of real or personal property has long existed in the Courts of equity; and we find that, as ancillary to that power, the Courts of equity have ordered the removal, where necessary, of obstructions to the inspection. In the notes to *East India Company v. Kynaston* (a) two cases are reported in which, under circumstances very similar to the present, such orders were made. In *Earl of Lonsdale v. Curwen* (b) the defendant had worked his own mines, so as, by the rubbish, &c., to obstruct the passages to the spot where the inspection was sought. An order was made that the viewers should inspect the mine, and that the defendant should remove the obstruction. In *Walker v. Fletcher* (c) the defendants had, in working their own mines, either bonâ fide to keep out the water, or colourably to prevent the inspection, erected framed dams and barriers, the effect of which was to drown the part of the mine where it was alleged that the encroachment had taken place. The order made was, that that the defendant should remove the framed dams and barriers as the viewers should direct; and that the viewers were to cause the same to be removed, unless they should be of opinion that the collieries would be thereby destroyed. This latter case, which was decided in the time of Lord *Eldon*, is a strong assertion of the power to remove obstructions to inspection; and seems to us to go far to support, in

(a) 3 *Bligh. O. S.* 153.

(b) 3 *Bligh. O. S.* 168, note,

(c) 3 *Bligh. O. S.* 172.

that respect, the order now complained of. In the recent case of *Ennor v. Barwell* (a) the Lords Justices varied an order of *Stuart V. C.*, in which he had directed that the plaintiff should be at liberty to cut trenches in the defendant's ground, in order to ascertain the geological formation of the ground there, as being too extensive; but no doubt was thereby thrown on the jurisdiction exercised in *Earl of Lonsdale v. Curwen* (b), or *Walker v. Fletcher* (c). The 58th section of The Common Law Procedure Act, 1854, does not regulate the jurisdiction given to the Courts of law by reference to that already exercised by the Courts of Equity; but we think that, as ancillary to the power of inspection given to the Courts of common law, there is the same power given to remove obstructions with a view to inspection, which was exercised by the Courts of equity as ancillary to their power of ordering inspection. The order complained of does not, as it seems to us, go further than that made in *Walker v. Fletcher* (c). This being our opinion, the rule must be discharged.

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Rule discharged.

(a) 1 *De G. F. & J.* 529.(b) 3 *Bligh. O. S.* 168, note.(c) 3 *Bligh. O. S.* 172.

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Monday,
January 14th.

SINCLAIR, administratrix, against The MARITIME
PASSENGERS' Assurance Company.

Defendants,
a Company
established
"for granting
assurances
against loss
of life and
personal
injury arising
from accident
at sea,"
granted a
policy to S.,
the master of
a ship then
about to pro-
ceed on a
voyage from
England to
Aden; whereby
it was agreed
that in case S.
"should sustain
any personal

CASE stated by consent, and by order of *Blackburn J.*,
for the opinion of the Court, without pleadings.

This was an action brought by the plaintiff, as admi-
nistratrix of *Lawrence Sinclair*, deceased, against the
defendants, for the recovery of the sum of 100*l*.

The case stated that *Lawrence Sinclair*, in the policy
of assurance thereafter mentioned, and therein called
and described as "the assured," then of *South Shields*,
in the county of *Durham*, master of the ship *Sultan*,
being about to proceed on a foreign voyage, namely, a
voyage from the river *Tyne* to *Aden* and elsewhere,
did, on 13th *March*, 1857, effect an assurance on his
injury from, or by reason or in consequence of, any accident which should happen to him
upon any ocean, sea, river, or lake," during the continuance of the policy, defendants
should pay him a reasonable compensation for such injury; and in case he should die
from the effects of such injury within three calendar months from the occurrence of the
accident, should pay the sum insured to his executors or administrators. It was further
agreed by the policy that no compensation should be payable thereunder by defendants,
either to S. or his personal representatives, in respect of injury occasioned to S. by
wounds in battle or in any way by the act of the Queen's enemies; or in respect of any
injury to which S. should knowingly and without some adequate motive expose himself;
but it was declared that, with those exceptions, the policy was intended to secure com-
pensation to S. or his representatives "in the event of his sustaining any personal injury
during the said intended voyage, from or by reason or in consequence of any accident
whatsoever."

S. then sailed on his intended voyage, and in the course of it arrived in the *Cochin*
river, on the south-west coast of *India*. Whilst on board his ship in that river, and
acting as master of the ship, he was struck down by a sunstroke, to which he did not
knowingly and without adequate motive expose himself, and from the effects of which he
on the same day died.

In an action by S.'s administratrix on the policy to recover the sum insured from
defendants; Held, that defendants were not liable: for that S.'s death could not be said
to have arisen from accident, within the meaning of the policy.

life with the defendants, *The Maritime Passengers' Assurance Company*, "for granting assurances against loss of life and personal injury arising from accident at sea," for the sum of 100*L.*; and did then pay to the defendants the sum of 1*L.* as premium thereon for one year, the said sum of 1*L.* being the amount of premium required by the defendants in consideration of the said insurance; and did afterwards pay or cause to be paid to the defendants, and the defendants did, in *March*, 1858, accept, the further sum of 1*L.* premium, as a further and continuing consideration for the said insurance of 100*L.*; and, at the time of the death of the said *Lawrence Sinclair* thereafter mentioned, all the premiums due and payable to the defendants in consideration for the said assurance were and had been paid, and the said policy of assurance was in full force and effect. And the said *Lawrence Sinclair*, in his life, and the plaintiff, administratrix as aforesaid, since his death, had in all things conformed to and performed and kept all things in the said policy mentioned, and all the conditions endorsed thereon, on their parts, and had given all notices required thereby, and all things had happened and been performed, and all times had elapsed, necessary to entitle the plaintiff to maintain this action, if the Court should answer in the affirmative the question thereafter proposed for their consideration.

By the said policy of assurance it was (inter alia) agreed that in case the said *Lawrence Sinclair*, therein called the assured, should sustain any personal injury from or by reason or in consequence of any accident which should happen to him upon any ocean, sea, river, or lake, within the period of twelve calendar months from the date of the said policy, and subsequently

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during the continuance of the said policy, the defendants should be liable to pay and would pay to the said assured a reasonable compensation for the said injury. And it was further agreed that, in case the assured should die from the effects of the said injury within the period of three calendar months from the occurrence of the accident causing such injury, the defendants would pay to the executors or administrators of the said assured the said sum of 100*l*.

And it was further agreed by the said policy of assurance that the assured should not, nor should his legal personal representatives, be entitled to any compensation whatsoever, under or by virtue of the said policy, in respect of any injury, whether resulting in loss of life or not, which should arise from, or be occasioned by, any wound received in battle, or in any way caused by the act of the Queen's enemies, or in respect of any injury to which the assured should knowingly and without some adequate motive expose himself: but, save and except as aforesaid, the said policy was intended to secure compensation to the assured, or to his legal personal representatives, in the event of his sustaining any personal injury during the said intended voyage, from or by reason or in consequence of any accident whatsoever.

The said assured did, on or about 13th *March*, 1857, sail in the said ship from the river *Tyne* on his said intended voyage, and, on or about 29th *June*, 1858, arrived at and in the *Cochin* river, on the south-west coast of *India*; and whilst on board the said ship, in the said river, and while acting as master thereof and superintending the turning of the said ship (which was being hove on to her port side), was struck down by a sunstroke, and died the same day from the effects of the said sunstroke.

It was admitted that the said assured died from the effects of the said sunstroke, and that he did not knowingly and without adequate motive expose himself to the same. And it was agreed that the said policy of assurance, and the conditions endorsed thereon, should accompany and be taken to be and form part of the case; and that the Court should be at liberty to draw inferences of fact.

The question, therefore, for the opinion of the Court was, Whether the death of the said *Lawrence Sinclair*, so caused by the said sunstroke as aforesaid, was death resulting from an accident causing personal injury, within the true intent and meaning of the said policy.

If the Court should be of opinion in the affirmative, then it was agreed by and between the plaintiff, administratrix as aforesaid, and the defendants, that the judgment of the Court should be entered for the plaintiff for the sum of 100*l.* with taxed costs. But if the opinion of the Court should be in the negative, then it was agreed that the judgment of the Court should be entered for the defendants, with taxed costs.

Macnamara, for the plaintiff (a). The question is whether sunstroke is an accident, within the meaning of the policy. It falls within the definitions of the word "accident" given in dictionaries. *Johnson*, for instance defines the word to mean "That which happens unforeseen; casualty; chance"; and *Richardson*, "That which falls, or happens, or occurs to; generally with a sub-condition of something unforeseen, unexpected, unfortunate, unnecessary, without design, contrivance, or

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intention." It was clearly contemplated by the policy that the defendants should be liable to a very wide extent. This is shewn by the express exception of the defendants from liability for injury occasioned to the assured by wounds received in battle ; which injury, it is to be presumed, the parties to the policy regarded as an accident ; for otherwise it would have been unnecessary to protect the defendants from liability in respect of it. [*Hill J.* Would you say that death from jungle fever is an accident ?] It is not necessary to contend that the term "accident" extends to diseases. [*Cockburn C. J.* Suppose, in the present case, that the sunstroke had brought on a fever from which death had resulted. *Hill J.* Or that it had brought on a fatal apoplexy.] Even if so, the defendants would probably have been liable ; the sunstroke, the primary cause of the injury, being a something happening to the assured *ab extra*, not, like disease, a something *ab intra*. Any injury caused by external agency, which the injured person is unable to foresee, and against which he has no opportunity of guarding, is an accident, at all events within the meaning of this policy. Injury from sunstroke is not alluded to in the exceptions ; but the policy declares that "save and except" the specified injuries, the "policy is intended to secure compensation to the assured, or to his legal personal representatives, in the event of his sustaining any personal injury during the said intended voyage, from or by reason or in consequence of any accident whatsoever." [*Cockburn C. J.* In *Indian* latitudes, sunstroke is so common a result of exposure to heat that it can hardly be regarded as an accident.] It is not the usual effect of heat in those climates to produce sunstroke. The case finds moreover, as an admitted fact,

that the assured did not knowingly and without adequate motive expose himself to the sunstroke. [*Cockburn* C. J. He might, however, have anticipated it as a not improbable event.] Hardly so: any more than he might have anticipated being struck by lightning. [*Hill* J. The language of the clause in the policy following the exceptions, is certainly very wide, and you may be justified in contending that the defendants were to be liable for any kind of unforeseen injury, not expressly excepted; though not falling within the strict definition of "accident." That was the intention. Moreover, it must be remembered that, if there is room for doubt, the words must, according to the general rule, be construed most strongly against the defendants. *Trew v. Railway Passengers' Assurance Company* (a) has some bearing on the present case; but does not decide the question one way or the other.

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Geary, for the defendants. The defendants are not liable. Death from sunstroke was not an "accident" to the assured within the natural and ordinary sense of that word. A disease is not an accident, however rare its occurrence may be. And sunstroke is a disease, rare elsewhere it is true, but in hot climates not uncommon. It is described as a disease in medical works: for instance, in *The Transactions of the Medical and Physical Society of Bombay*, for the years 1857 and 1858; *The American Journal of the Medical Sciences*, Nos. 73 and 75; and several numbers of *The Medical Times*. The cause of the death of the assured was therefore disease, not accident: still less an accident happening

(a) 5 H. & N. 211.

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to him upon any ocean, sea, river, or lake; which class of accidents alone were insured against by the policy.

Macnamara, in reply. The risks insured against by the policy were not limited to accidents of the sea or rivers; the words immediately following the enumeration of excepted risks shew that, with those exceptions, it was meant to cover injuries arising from any accident whatever. The only question is whether the sunstroke was or was not an accident. Having regard to the extensive language of the policy, it clearly was; notwithstanding the theories of medical men as to how far it is to be deemed a disease.

Cur. adv. vult.

COCKBURN C. J. now delivered the judgment of the Court (a). This was an action brought by the administratrix of one *Lawrence Sinclair*, on a policy of insurance effected by the deceased with the defendants, whereby he, being then about to proceed on a foreign voyage as master of a vessel, was insured to the extent of a reasonable compensation against any personal injury from or by reason of or in consequence of any accident which might happen to him upon any ocean, sea, river, or lake; and in the sum of 100*l.* for the benefit of his personal representative, in the event of the assured dying from the effects of any such injury within three months of its occurrence. The assured being with his ship in the *Cochin* river, on the south-west coast of *India*, while doing duty on the ship was (as it is termed in the special case) struck down by a sunstroke, from the

. (a) *Cockburn C. J. and Hill J.*

effects of which he died in the course of the same day. The question is whether, under such circumstances, the death of the deceased can be said to have arisen from accident, within the meaning of the policy. We are of opinion that it cannot, and that our judgment must be for the defendants.

It is difficult to define the term "accident," as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident, and injury or death from natural causes; such as shall be of universal application. At the same time we think we may safely assume that, in the term "accident" as so used, some violence, casualty, or vis major, is necessarily involved. We cannot think disease produced by the action of a known cause can be considered as accidental. Thus disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental; unless at all events, the exposure is itself brought about by circumstances which may give it the character of accident. Thus (by way of illustration), if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident. It is true that, in one sense, disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental,

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inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes.

In the present instance, the disease called sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased, in the discharge of his ordinary duties about his ship, became thus affected and so died.

We think, for the reasons we have given, that his death must be considered as having arisen from a "natural cause," and not from "accident," within the meaning of this policy. There must be judgment for the defendants.

Judgment for the defendants.

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Ex parte ANDERSON (a).

Tuesday,
January 15th.

EDWIN JAMES moved that a writ of habeas corpus ad subjiciendum be issued to the sheriff of the county of *York*, in *Canada*, and to the keeper of the gaol of *Toronto* in that county, to bring up the body of *John Anderson*.

The motion was made on the affidavit of *Louis Alexis Chamerovzow*, of 27, *New Broad Street*, in the city of *London*, secretary of *The British and Foreign Anti-Slavery Society*; which stated that *John Anderson*, of the city of *Toronto*, in Her Majesty's province of *Canada*, a *British* subject domiciled there, was, as the deponent believed, illegally detained in the criminal gaol of the said city against his will, not having been legally accused, or charged with, or legally tried or sentenced for, the commission of any crime, or of any offence against or recognized by the laws in force in the said province, or in any part of Her Majesty's dominions; and not being otherwise liable to be imprisoned or detained under or by virtue of any such laws: and that, unless a peremptory writ of habeas corpus should immediately

The superior Courts of common law at *Westminster* have jurisdiction at common law to issue a writ of habeas corpus ad subjiciendum, to all parts of the dominions of the Crown of *England*, even to those in which an independent local judicature has been established. Such jurisdiction can be taken away only by express legislative enactment.

Accordingly, this Court granted a writ of habeas corpus directed to certain gaolers and others, in the province of *Upper Canada*, commanding them to bring up the body of *A.*, a *British* subject, alleged to be illegally in their custody.

(a) In consequence of the decision in this case it has since been enacted, by stat. 25 & 26 *Vict. c. 20. s. 1.*, that no writ of habeas corpus shall issue out of *England* by authority of any Judge or Court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established Court or Courts of justice, having authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion. Sect. 2 provides that the Act shall not affect or interfere with any legally existing right of appeal to Her Majesty in council.

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Edwin James, for the writ. The Crown, through the superior Courts at *Westminster*, has power to issue the prerogative mandatory writ of habeas corpus to any part of the Queen's dominions, and therefore to *Canada*. Stat. 14 G. 3. c. 83., "An Act for making more effectual provision for the government of the province of *Quebec* in *North America*," recites in the preamble that the "countries, territories, and islands in *America*," dealt with by the Act, were "ceded to His Majesty by the" "treaty of peace, concluded at *Paris* on 10th *February*, 1763"; and, by stat. 31 G. 3. c. 31. s. 2., the province of *Quebec* is divided into two separate provinces called the province of *Upper Canada* and the province of *Lower Canada*. [*Hill J.* I observe that stat. 14 G. 3. c. 83. enacted, by sect. 8, "that in all matters of controversy, relative to property and civil rights, resort" should "be had to the laws of *Canada*, as the rule for the decision of the same;" and, by sect. 11, that the criminal law of *England* was to be continued in force in the province.] There can be no doubt but that the writ of habeas corpus may issue to *Canada*. In delivering the judgment of this Court in *Leonard Watson's Case* (a), Lord Denman, C. J. said, "The difficult questions that may arise touching the enforcement in *England* of foreign laws, are excluded from this case entirely; for *Upper Canada* is neither a foreign state, nor a colony with any peculiar customs. Here are no mala prohibita by virtue of arbitrary enactments; the relation of master and slave

(a) 9 A. & E. 731. 782.

is not recognized as legal: but Acts of Parliament have declared that the law of *England*, and none other, shall there prevail." No precedent has been discovered of an actual issue of the writ to *Canada*; but no distinction exists, for this purpose, between that colony and any other part of the dominions of the Crown. In *Bac. Abr. tit. Habeas Corpus* (B). 2, under the heading, "To what places it may be granted," the law is thus laid down: "It hath been already observed, that the writ of habeas corpus is a prerogative writ, and that therefore, by the common law, it lies to any part of the King's dominions; for the King ought to have an account why any of his subjects are imprisoned, and therefore no answer will satisfy the writ, but to return the cause with paratum habeo corpus, &c. Hence it was holden, that this writ lay to *Calais* at the time it was subject to the King of *England*." In delivering the judgment of the Court in *Rex v. Cowle* (a), in which case the question was whether this Court had jurisdiction to issue a certiorari to *Berwick-upon-Tweed*, Lord Mansfield C. J. said, "Writs, not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the King,) such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no clause in the constitution given to *Berwick*: upon a proper case, they may issue to every dominion of the Crown of *England*. There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of *England*; the only question is, as to the propriety. To foreign dominions, which belong to a prince who succeeds to the throne of *England*, this

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(a) 2 Burr. 834. 855.

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and any writ of any kind. We
corpus to *Scotland* or to the *Elec-*
the *Isle of Man*, the *Plantations*,
the loss of the Duchy of *Normandy*, they
considered as annexed to the Crown, in some
to *Guernsey* and *Jersey*, we may; and formerly,
to *Calais*; which was a conquest, and yielded to
the Crown of *England* by the treaty of *Bretigny*." In
1397, a writ of *habeas corpus*, tested per ipsum regem
et concilium in parlamento, was sent to the governor of
Calais, to bring up the body of *Thomas*, Duke of *Glou-*
cester, then in custody there, to answer a charge of
treason preferred against him by the Duke of *Rutland* and
others (a). [Crompton J. That was a writ ad respon-
dendum, which is on a different footing from the writ ad
subjiendum.] The following entry in 2 *Peere Williams's*
Rep., p. 74, supports Lord *Mansfield's* statement, already
cited, that the writ may go to the *Plantations*. "Memor-
andum, 9th of *August*, 1722, it was said by the Master
of the Rolls to have been determined by the Lords of
the Privy Council, upon an appeal to the King in coun-
cil from the foreign plantations, 1st, that if there be a
new and uninhabited country found out by *English*
subjects, as the law is the birthright of every subject, so,
wherever they go, they carry their laws with them, and
therefore such new found country is to be governed by
the laws of *England*: though, after such country is
inhabited by the *English*, Acts of Parliament made in

(a) *Rymer's Fœdera*, vol. 3, part 4, p. 135 (*Hague* edition, 1740).
James also stated that he had found the following instances of writs
having issued to *Calais*. A writ of *amoveas manus*, in 1363; of attach-
ment, from the Court of King's Bench, against the mayor, for disobeying
a writ, in 1364; and of inquisition, to inquire into the goods of a felon,
in 1374.

England, without naming the foreign plantations, will bind them." These dicta are in accordance with the general law of nations. Thus *Vattel* lays it down (a) that "when a nation takes possession of a distant country, and settles a colony there, that country, though separated from the principal establishment, or mother country, naturally becomes a part of the state, equally with its ancient possessions. Whenever, therefore, the political laws, or treaties, make no distinction between them, everything said of the territory of a nation must also extend to its colonies." In *Campbell v. Hall* (b) Lord *Mansfield* C. J. pointed out that it is clear that a country conquered by the *British* arms becomes subject to the Legislature of *Great Britain*; though the laws of such a country may be changed by the authority of the Crown. He gave as instances, amongst others, *Berwick*, *Gascony*, *Guicenne*, *Calais* and *Minorca*. [Cockburn C. J. At the time of the decision in *Rex v. Cowle* (c) *Berwick* was not subject to the laws of *Scotland*. There was, consequently, no superior Court with power to control proceedings instituted there, unless the superior Courts of *Westminster* had jurisdiction to do so. *Blackburn* J. In the course of the judgment, Lord *Mansfield* C. J. says, (d), "The charter gives them" (the corporation of *Berwick*) "power to make ordinances with penalties of fine and imprisonment: so as they be reasonable, and not repugnant to the laws, statutes and customs of *England*. In short, they have no criminal law, but the law of *England*; and no criminal jurisdic-

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(a) *Law of Nations*, book 1, ch. 18, sect. 210. p. 100 (*Chitty's* edition, 1834).

(b) 1 *Cowp.* 204. 208. 210.

(c) 2 *Burr.* 834.

(d) 2 *Burr.* 855.

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tion, but with such a reference to the law of *England*, as necessarily includes this Court." Can the same be said of *Canada*? *Cockburn C. J.* *Canada* possesses an independent Legislature and an independent judicature. *Crompton J.* You must make out that we have concurrent jurisdiction with the superior Courts of *Canada*.] The mere fact that the Crown has granted a local judicature to a colony, with the same jurisdiction, within the colony, that the superior Courts of *England* have over the whole of the realm, does not, in the absence of express enactment to the contrary, oust the Crown of its right to control the local Courts in the exercise of their jurisdiction. There is a local judicature in *Ireland*; but, in *Anonymous (a)*, the Court seemed to be of opinion that a habeas corpus might be sent to *Ireland* to remove a person taken in execution upon a judgment there. [*Hill J.* At that time an appeal lay from *Ireland* to this Court. But appeals from the colonies lie only to the Queen in Council.] There are several instances in which the jurisdiction of the *English* superior Courts to issue a habeas corpus to the foreign dominions of the Crown has been considered. In *Crawford's Case (b)* this Court appears to have thought that the writ, *ad subjiciendum*, runs at common law to the *Isle of Man*; at any rate since stat. 5 G. 3. c. 26., by which the island was vested inalienably in the King and his successors, as part of the dominions of the Crown of *England*. In *Ex parte Lees (c)* the Court refused a writ of error to bring up the record of the conviction of the prisoner for a criminal offence, by the Supreme Court of *St. Helena*, on the ground that the Attorney General's fiat for the writ had not been obtained. *Crompton J.*, however,

(a) *Vent.* 357.

(b) 13 Q. B. 613.

(c) *E. B. & E.* 828.

afterwards granted a writ of habeas corpus in that case. [Crompton J. I granted the writ as ancillary to the writ of error, which the Crown had afterwards allowed to issue. Cockburn C. J. At the time of the argument of the question whether the writ of error ought to be granted, the Court seems to have doubted whether a writ of habeas corpus could issue to *St. Helena*. In delivering the judgment of the Court, Lord Campbell C. J. says (a), "No precedent" "of any such proceeding" as a writ of error or certiorari "with respect to a dependency like *St. Helena*, for several centuries, was brought before us; and it was not at all explained in what manner our writs of error, certiorari or habeas corpus would be enforced in such dependencies."] It has been decided that the writ of habeas corpus ad subjiciendum runs to *Jersey*; *Carus Wilson's Case* (b), *Dodd's Case* (c). [Hill J. Suppose that we issue the writ in the present case, and that the parties to whom it is directed refuse to obey it, what remedy should we have?] The writ might then be enforced by attachment. [Hill J. Could we send our own officer to *Canada* for that purpose?] Yes, if necessary: and the attachment would be valid. The same difficulty, if it be one, would arise in the case of an issue of the writ to *Jersey*. In the case before the Court the interests of a *British* subject are vitally affected. The Court will not, therefore, refuse to exercise, in his favour, a jurisdiction warranted by numerous precedents, merely on the ground that there may be difficulty in enforcing the writ, when granted.

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(a) *E. B. & E.* 834.(b) 7 *Q. B.* 984.(c) 2 *D. G. & J.* 510.

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The COURT (a) retired for consultation. On their return, *Cockburn* C. J. delivered judgment as follows.

We have considered this matter; and the result of our anxious deliberation is, that we think the writ ought to issue. At the same time, we are sensible of the inconvenience which may result from such a step; and that it may be felt to be inconsistent with that higher degree of colonial independence, both legislative and judicial, which happily exists in modern times. Nevertheless, it is to be observed that, in establishing a local judicature in *Canada*, our Legislature has not gone so far as expressly to abrogate the right of the superior Courts at *Westminster* to issue the writ of habeas corpus to that province; which writ, in the absence of any prohibitive enactment, goes to all parts of the Queen's dominions. Lord *Coke* (b), Lord *Mansfield* (c), *Blackstone* (d) and *Bacon's Abridgment* (e) all agree that writs of habeas corpus have been and may be issued into all parts of the dominions of the Crown of *England*, wherever a subject of the Crown is illegally imprisoned or kept in custody. In addition to these dicta of eminent authorities, we have actual precedents of the issue of the writ, in very modern times, into the Islands of *Man*, *Jersey* and *St. Helena*. Inasmuch, therefore, as the power of this Court thus to issue the writ has been not merely asserted as matter of doctrine, but carried into effect in practice; and as the writ has issued even into dominions of the Crown in which there is an independent local judicature; we think that nothing short of

(a) *Cockburn* C. J., *Crompton*, *Hill* and *Blackburn* Js.

(b) See *Calvin's Case*, 7 Rep. 20 a.

(c) In *Rex v. Cowle*, 2 Burr. 834. 855.

(d) *Commentaries*, vol. 3, p. 131.

(e) *Tit. Habeas Corpus* (B) 2.

legislative enactment would justify us in refusing to exercise the jurisdiction, when called upon to do so for the protection of the personal liberty of the subject. It may be that the Imperial Legislature has thought fit to leave the three superior Courts at *Westminster* the same concurrent jurisdiction in this matter with the colonial Courts that they have inter se. Both upon authority and upon precedent, we think that the writ ought to go.

Writ of habeas corpus granted (a).

(a) The writ was directed to the sheriff of the county of *York*, in *Canada*, in Her Majesty's province of *British North America*, and the keeper of the gaol in the city of *Toronto*, in the said county; to the sheriff of the county of *Brant*, in *Canada* aforesaid, and to the keeper of the gaol in the town of *Brantford*, in the said county; and to all other sheriffs, gaolers, and all constables and others in the said province, having the custody or control of the said *John Anderson*.

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MOURILYAN v. LABALMONDIERE.

Wednesday,
January 16th.

(Reported, 1 *E. & E.* 533.)

MILVAIN and another *against* PEREZ and others. Friday,
January 18th.

DECLARATION, upon a charterparty made between plaintiffs and defendants. The charterparty, By a charterparty made between plaintiffs, ship-owners, and

defendants, agents in *England* for foreign charterers, it was agreed that plaintiffs' ship the *B.* should proceed to *J.*, and there load in regular turn, in the customary manner, from defendants, a full and complete cargo of coke. It was further agreed that, as defendants were acting for foreign principals, "all liability of" defendants "in every respect, and as to all matters and things, as well before and during as after the shipping of the said cargo," should "cease as soon as they" had "shipped the cargo."

Defendants having loaded and shipped the agreed cargo, plaintiffs afterwards sued them in this action for not having shipped it in regular turn. Held, that the action would not lie, for that the charterparty limited defendants' liability to the actual shipment of the cargo, and protected them from responsibility for any irregularity or delay in the shipment.

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"It is this day mutually agreed between *Henry Milvain Esquire*" (meaning plaintiffs), "owner of the good ship or vessel called *The Bomarsund*," "now in the *Tyne*, and *Messieurs Perez, Williams & Bilton*" (meaning defendants), "as agents for the charterers, that the said ship, being tight, staunch and strong, and every way fitted for the voyage, shall proceed to *Ramsey's Coke Ovens* at *Jarrow*, and there load in regular turn, in the customary manner, from the agents of the said charterers (except in case of riots, strikes, or any other accidents beyond their control, which may prevent or delay her loading), a full and complete cargo of coke;" "and being so loaded shall therewith proceed to *Carthagera* for orders to discharge there, at *Escombreras* or *Porman*, and there discharge the cargo upon being paid freight." "The vessel to be consigned to the charterers' agents at port of discharge, and to pay the usual commission of two per cent." "This charter being concluded by *Messieurs Perez, Williams & Bilton*, on behalf of another party resident abroad, it is agreed that all liability of the former in every respect, and as to all matters and things, as well before and during as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo; and, further, that the vessel shall be cleared at the custom house by them." The declaration then made the following averments. That the charterparty was signed by defendants in these words, "*Perez, Williams & Bilton*, agents;" that the ship did proceed to the said *Ramsey's Coke Ovens* at *Jarrow*, and there were no riots, strikes, or any other accidents beyond defendants' control, which prevented or delayed the loading

of the said cargo as agreed; and that plaintiffs were always ready and willing to do, and did, all things necessary to oblige defendants to load the said cargo, as agreed, and to entitle plaintiffs to have the said cargo loaded as agreed; and all things happened which were necessary to happen to oblige defendants to load the said cargo as agreed, and nothing ever happened to excuse defendants from loading the said cargo as agreed; of all which premises defendants always had notice, and the time for defendants' loading the said cargo as agreed elapsed before suit. Breaches: That defendants did not load the said cargo as agreed; that they made default in loading such cargo for a long and unreasonable time; and that they did not load the said ship with such cargo in regular turn, in the customary manner.

Plea. That the said charterparty was in fact made by defendants as agents on behalf of another party, resident abroad, to wit *Gregorio de Bayo, of Carthagena, in Spain*, and that the said agreed cargo was loaded and shipped and the said vessel was cleared by defendants at the custom house, before the commencement of this suit: and thereupon all liability of defendants in every respect under and to the performance of the said charterparty, and to damages sustained by plaintiffs by the nonperformance thereof, ceased.

Demurrer. Joinder in demurrer.

T. Jones (Northern Circuit), in support of the demurrer. The plea is bad. It admits all the breaches assigned in the declaration, the last of which, namely, that the defendants did not load the cargo in regular turn, is the most material. If the defendants loaded the cargo out of the regular turn, they are answerable to the

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plaintiffs for the damage thence ensuing; and are not protected by the clause in the charterparty which provides that their liability is to cease as soon as they have shipped the cargo. The protection does not extend to relieve them from liability for a shipment not in accordance with the stipulations of the charterparty. [*Crompton J.* You give no effect to the words "as well before and during as after the shipping of the said cargo." Do they not import that, if the ship is actually loaded by the defendants, they are not to be liable for anything occurring in the course of loading?] No. The meaning is, that they are not to be liable for anything which occurs during the loading of the ship in regular turn, provided she is so loaded. The effect is the same as if the charterparty had contained a stipulation that the ship should be loaded on a named day; the 1st *January* for instance. If so, would the defendants have been protected, had they delayed the loading for several subsequent days? Under the charterparty, as actually framed, could they justify loading the ship whenever they pleased; and after a delay however great? [*Hill J.* Perhaps your argument might have had some foundation, if a specific day had been named for the loading.] The stipulation that the ship should be loaded in regular turn is in principle the same thing. Any other construction of the charterparty, taken as a whole, leaves the plaintiffs remediless. The question is, to what extent have the defendants limited their liability; *Oglesby v. Yglesias* (a).

Manisty, contra, was not called upon.

(a) *E. B. & E.* 930.

COCKBURN C. J. This is a very clear case. The defendants, entering into a charterparty as agents for a foreign principal, expressly stipulated that their liability in every respect, and as to all matters and things, as well before and during, as after, the shipping of the cargo, should cease as soon as they had shipped the cargo. It is now sought to make them liable for not loading the cargo in regular turn. But their neglect, if any, in so doing, must fall under the head of some matter or thing done before and during the shipping of the cargo. Possibly the defendants felt the necessity for having a stringent protecting clause inserted in the charterparty. They had a perfect right to protect themselves to the fullest extent; and, they having done so, it is evident that the shipowner cannot now hold them responsible.

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(WIGHTMAN J. was absent.)

CROMPTON J. I am of the same opinion. The defendants, knowing, no doubt, that persons entering into charterparties merely as agents for others are often held personally liable upon them, have said in effect to the plaintiffs, in the charterparty before us; "Inasmuch as we are acting for a foreign principal, we will accept no further liability than this: If the ship is not loaded, we will be responsible; but, once she is loaded, we will not be liable in respect of anything that may happen before, during, or after, the loading." The stipulation is, that the defendants' liability shall cease "as soon as they have shipped the cargo;" and the only question is, what is the meaning of those words. They clearly refer to the fact only, and not to the time or manner, of ship-

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ment. If the argument for the plaintiffs were well founded, the defendants would be liable for everything that occurred, either before, during or after, the loading, if the loading was not in regular turn. But it is evident that the defendants were not to be in any way responsible, provided the loading took place under the contract; although the cargo might be shipped a day or two later than was regular.

HILL J. I am of the same opinion. The parties were at liberty to make what contract they pleased; and it is the duty of the Court to construe the contract actually made, according to their intention. *Oglesby v. Yglesias* (a) shews that it was competent to the defendants to stipulate that they should not be liable for anything occurring before, during, or after the shipping of the cargo; provided that they shipped it. In the present case the plaintiffs, admitting that the defendants have shipped the cargo, say that it was shipped too late, not having been shipped in regular turn. The defendants have, however, by plain words in the charterparty, to be construed according to their plain meaning, protected themselves from all liability on that account; and the only person responsible to the plaintiffs is the defendants' foreign principal.

Judgment for defendants.

(a) *E. B. & E.* 930.

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THE QUEEN, on the prosecution of the Committee of Justices of the Peace for the County of *Northumberland*, appointed under stat. 15 & 16 Vict. c. 81. for the purpose of preparing a basis or standard for fair and equal County rates in the said County, appellants, and THOMAS DOUBLEDAY, respondent.

*Saturday,
January 19th.*

CASE stated, under stat. 20 & 21 Vict. c. 43., by justices of *Northumberland* in Petty Sessions.

An information was laid by *William Dickson*, of *Alnwick*, in the county of *Northumberland*, clerk to the

Stat. 15 & 16
Vict. c. 81.,
by sect. 2,
empowers the
justices of a
county to ap-
point a com-
mittee of their
body for the

purpose of preparing a basis or standard for fair and equal county rates, to be founded on the full and fair annual value (interpreted by sect. 6 to mean the net annual value) of the property rateable to the poor-rate in every parish in the county. Sect. 5 empowers this committee to order, in writing, certain specified parish officers and other persons, having the custody or management of any public or parochial rates or valuations of the parishes, to make written returns to the committee of the amount of the full and fair annual value of the property in any parish liable to be assessed toward the county rate; the date of the last valuation for the assessment of such parish; and the name of the surveyor or other person by whom such valuation was made. By sect. 7 the committee may, by their order in writing, require the "overseers of the poor, constables, assessors, collectors, and any other persons whomsoever, to appear before them," "and to produce all parochial and other rates, assessments, valuations, apportionments, and other documents in their custody or power relating to the value of or assessment on all or any of the property within the several parishes" "which may be liable to be assessed toward the county rate, and to be examined on oath" "touching the said rates, assessments, valuations, or apportionments, or the value of property aforesaid." By sect. 8, "every person who shall neglect or refuse to appear when required so to do as aforesaid, or to be sworn or examined, or to produce such documents as hereinbefore provided," is subjected to a penalty not exceeding 20*l.*, recoverable before justices.

Held, that sect. 7 authorizes the committee to call before them all persons whomsoever, able to give evidence of, and produce any documents relating to, the actual annual value of the property to be assessed to the county rate; and does not restrict the committee to ascertaining, by the examination of the persons, and the inspection of the documents, specified in sect. 5, the amount at which the property is rated to the poor-rate. That therefore a person having in his possession private accounts and documents relating to the annual value of collieries and coal mines assessable to the county rate, and able to give evidence touching their net annual value, incurs the penalty under sect. 8 by refusing to obey an order of the committee, under sect. 7, for his appearance before them with such accounts and documents.

1861. committee of justices of the peace for the said county, appointed, under stat. 15 & 16 *Vict. c. 81.*, for the purpose of preparing a basis or standard for fair and equal county rates in the said county, duly authorized in that behalf, and acting by the order and for and on behalf of the said committee: who complained that *Thomas Doubleday*, of *Newcastle-upon-Tyne*, Esquire, (the respondent,) having been required by an order in writing of the committee, signed by the said *William Dickson*, as their clerk and by their order, and duly served upon him, to appear before the said committee on the 4th day of *April*, 1860, at the Court House at *Morpeth*, in the said county, at twelve o'clock at noon, and then and there to produce before them all accounts of receipts and expenditure, and all other documents in his custody or power relating to the value of certain collieries and coal mines in the east division of *Castle Ward*, in the said county, to wit, *Backworth* colliery, *Seghill* colliery, and *Burradon* colliery, such collieries and coal mines being property in the several parishes within the said division, liable to be assessed towards the county rate; and to be examined on oath, and answer such questions as the said committee might put to him respecting the said several collieries and coal mines, so that, with the aid of the returns from the parochial and other rates then in the custody of the said committee, they might be enabled more correctly to arrive at the true rateable value of such collieries and coal mines; did unlawfully, and without any reasonable excuse, neglect to appear before the said committee accordingly, contrary to the form of the statute in such case made and provided.

This information was laid under stat. 15 & 16 *Vict. c. 81. s. 8.*

The prosecutors (that is to say, the said committee by *William Dickson* their clerk) and the respondent (hereinafter called the defendant), having been duly summoned, appeared at the hearing.

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The facts were admitted by the defendant to be correctly laid in the information. It was also admitted by him that he had in his possession private accounts and documents relating to the annual value of the collieries and coal mines in the information mentioned, and that he was able to give evidence touching the net annual value; but he declined to produce the said documents, or to give the required evidence.

It was admitted by the prosecutors that the defendant was not an overseer of the poor, a constable, an assessor, or collector of public rates of or for any parish, township, borough, or place, within the county; and that he was not a person having the custody or arrangement of any public or parochial rates or valuations of any such parish, township, borough, or place, within the county. It was also admitted by the prosecutors that the defendant had not in his custody or power any parochial or other rates, assessments, valuations, apportionments, or other documents, relating to the value or assessment on all or any of the property with respect to which he was required to give evidence. And further, that any documents in the defendant's possession or information, relating to the subject-matter of the inquiry, were so solely in his private capacity.

On the part of the said committee, it was contended that they have the power to require the owners and lessees of collieries and land, and any other person or persons whomsoever, to appear before them and to produce their private accounts, or other documents of a like

1861. nature, in their custody or power, relating to (that is, calculated to shew) the net annual value of any property in the county rateable to the relief of the poor ; and that the expression "any other persons whomsoever," in the 7th section of the Act, is not confined or limited to persons, being public officers, having the custody of parochial and such like documents. That the primary object of the statute is to enable the committee to prepare a basis or standard for fair and equal county rates; the same to be prepared rateably and equally, according to the full and fair annual value of the property rateable to the relief of the poor. That, by section 6, the words "full and fair annual value" are to be taken to mean the net annual value of the property. That, to enable the committee to arrive at and ascertain that value, very extensive powers are given to them by sections 5 and 7, including the power to call before them "any persons whomsoever," to produce documents and to be examined upon oath touching the value of the property to be assessed. That, if it be said that the expression "any persons whomsoever," in the 7th section, must be construed to mean any persons of a public or quasi public character, such as constables and others mentioned in the Act, the answer to that argument is two-fold. First, the object of the Legislature requires a more liberal construction of the words; and, secondly, the marked difference between the language used in the 5th section (which is confined to persons of a public or quasi public character) and that used in the 7th section, clearly shews that the intention of the Legislature was to confer upon the committee the power of calling for private accounts, and examining private individuals with reference to the net annual value of any of the rateable property in the county.

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It was also contended by the said committee, that, in the case of collieries, the overseers have no means of ascertaining the rents paid by the lessees, or of ascertaining what additional annual value should be put upon the collieries in respect of things affixed and giving additional value to the freehold (such as waggon ways &c.), and such information can only be obtained by the examination of the owners or lessees of the collieries, or their agents, and by compelling them to produce such documents as are in their possession or power relating to the net annual value of the property in question.

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On the other hand it was contended, on the part of the defendant, that the committee have not the power to require him to appear before them and produce his private accounts, or other documents of a like nature, relating to the value of any property liable to be assessed to the county rate, and to examine him on oath and compel him to answer questions touching the value of property.

The justices' view of the provisions of the statute coinciding with that of the defendant, they dismissed the information.

If the Court should be of opinion that this determination was wrong, the justices requested that the matter might be remitted to them, with the opinion of the Court thereon accordingly; or that the Court would make such other order in relation to the matter as to the Court should seem meet.

Manisty, for the appellants. The justices were wrong in dismissing the information. The words "any persons whomsoever," in stat. 15 & 16 *Vict. c. 81. s. 7.*, are to be read in their natural sense, and not to be restricted

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to the public officials mentioned in sect. 5. The Act, by section 2, provides for the appointment by justices in Quarter Sessions of a committee of justices "for the purpose of preparing a basis or standard for fair and equal county rates, such basis or standard to be founded and prepared rateably and equally according to the full and fair annual value of the property, messuages, lands, tenements, and hereditaments rateable to the relief of the poor in every parish, township, borough, or place," within the limits of the justices' commissions. Then sect. 5 enacts that, "For the purpose of preparing such basis or standard for fair and equal county rates the said committee, by their order in writing, to be signed by their clerk, may from time to time, as often as they may deem it necessary, direct the overseers of the poor, constables, assessors, and collectors of public rates of or for any parish, township, borough, or place within the county, and all other persons having the custody or management of any public or parochial rates or valuations of any such parish, township, or place, to make returns in writing to the said committee, at such times and places as they may appoint, of the amount of the full and fair annual value of the whole or of any part of the property within the parish, township, or place liable to be assessed towards the county rate, together with the date of the last valuation for the assessment of such parish, and the name of the surveyor, or if no surveyor, then the name or names of the person or persons by whom and the manner in which the said valuation was made." By sect. 6, "For the purposes of preparing any such basis or standard for assessing any county rate, the words 'full and fair annual value' shall be taken to mean the net annual value of any property as the same is or may be

required by law to be estimated for the purpose of assessing the rates for the relief of the poor." Then sect. 7 enacts that "The said committee may from time to time, as often as they may deem it necessary, by their order in writing, signed as aforesaid, require the said overseers of the poor, constables, assessors, collectors, and any other persons whomsoever, to appear before them, when and where and as often as the said committee may deem expedient, and to produce all parochial and other rates, assessments, valuations, apportionments, and other documents in their custody or power relating to the value of or assessment on all or any of the property within the several parishes and places aforesaid which may be liable to be assessed toward the county rate, and to be examined on oath, and answer such questions as the said committee may put to them respectively touching the said rates, assessments, valuations, or apportionments, or the value of the property aforesaid." And, by sect. 8, "Every overseer of the poor, constable, assessor, collector, or other person so required to make returns, or to appear as aforesaid, who shall, without any reasonable excuse, neglect to make such returns in writing as aforesaid, or wilfully make any false return, and every person who shall neglect or refuse to appear when required so to do as aforesaid, or to be sworn and examined, or to produce such documents as hereinbefore provided, shall forfeit a sum not exceeding 20*l.*, to be prosecuted for and recovered by order of the said committee before any two" "justices." A comparison of these clauses with those of stat. 55 *G. 3. c. 51.*, one of the Acts repealed by stat. 15 & 16 *Vict. c. 81. s. 1.*, shews how much more extensive are the powers conferred upon the justices by the later Act.

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1861. Stat. 55 G. 3. c. 51. s. 2. corresponds, in substance, with
 The QUEEN v. DOUBLEDAY. stat. 15 & 16 Vict. c. 81. s. 5. But sect. 9 of the earlier Act, which answers to sect. 7 of the later, while it empowers the justices to call for the books of assessment of any rates or taxes, parliamentary or parochial, in the hands of any constable, churchwarden, overseer, assessor or collector, and to take copies thereof, authorizes them "to call before them any such constable, churchwarden, overseer, assessor or collector, to give evidence respecting the same;" whereas sect. 7 of stat. 15 & 16 Vict. c. 81. empowers the committee of justices, constituted under that Act, to require to appear before them, not only the parochial officers, but "any other persons whomsoever;" and to require such persons to produce, not only the parochial and other rates and assessments, but all other documents in their custody or power relating to the value of or assessment on all or any of the property liable to be assessed to the county rate, and to be examined respecting not only the rates, &c., but also the value of the property. The object of the Legislature, in this enactment, clearly was to enable the committee to obtain evidence from other than official quarters as to the real rateable annual value of such property as might be of a higher annual value than the amount at which it was rated to the poor-rate by the parish officers. The annual rent which a tenant pays or would pay for the property is the criterion of the rateable value of the property to the poor-rate; *Rex v. Chaplin* (a), *Allison v. Overseers of Monkwearmouth Shore* (b): but such property as collieries and coal mines may well be of higher value than the mere rent paid for them; and assessable

(a) 1 B. & Ad. 926.

(b) 4 E. & B. 13.

to the county rate accordingly. In giving the committee of justices power to call for the best evidence of the value of property the Legislature has but pursued the policy before adopted in the case of railway Companies, which, by The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20. s. 107., may be required to transmit to the overseers of the poor of the parishes, and to the clerks of the peace of the counties, through which their line passes, an annual account of their total receipts and expenditure for the year, and a statement of the balance. [*Crompton J.* No power is given by that Act to the churchwardens and overseers to call before them railway directors, to give evidence of the value of the line. However, it does not follow that the Legislature may not, by the Act now before us, have entrusted the committee of justices with the powers for which you are contending.]

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Mellish, for the respondent. It would require very strong and express words in the Act, to give the appellants the inquisitorial power which they claim. The object of the Act was that the committee of justices should ascertain, generally, whether any parish was rated to the county rate fairly or unfairly in proportion to other parishes, so that, if inequality in the assessment existed, it might be redressed. A common interest in all the parishioners to keep down the amount of the assessment might have induced a particular parish to rate the property within it below its value, in order to keep down its contribution to the county rate: and that was the mischief which the Legislature sought to remedy. The power to appeal against the basis of assessment to the county rate, given by stat. 15 & 16 Vict. c. 81. s. 17. both to parish officers and inhabitant parishioners, obviates the necessity for

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great strictness in the establishment of the basis in the first instance. Sect. 7 was intended merely to give effect to the provisions of sect. 5, by empowering the committee to call before them and examine the persons from whom sect. 5 authorizes them to require returns of the annual value of property. The words "any other persons whomsoever" in sect. 7 relate exclusively to the persons who are specified in sect. 5, in addition to those specified again in sect. 7: namely "all other persons having the custody or management of any public or parochial rates or valuations of any" "parish, township, or place." That this is so is shewn by the further provision, in sect. 7, that the persons summoned before the committee are "to produce all parochial and other rates, assessments, valuations, apportionments, and other documents in their custody or power relating to the value of or assessment on all or any of the property within the several parishes" "which may be liable to be assessed toward the county rate." The "value" here spoken of, must mean the value as shewn by the assessment. Again, the words "any other persons whomsoever," in sect. 7, cannot have a wider application than the words "other persons" in sect. 10; by which section parishes in which "overseers or other persons neglect to make" the "return in writing," required by sect. 5, are made liable to the expenses incurred in consequence by the committee in making the valuations. In both sections, by "other persons" are clearly meant the persons who, in addition to the overseers, are to be required, under sect. 5, to make the return. At all events, "any other persons whomsoever," in sect. 7, must refer to persons only who are ejusdem generis with those particularly mentioned, namely, "over-

seers of the poor, constables, assessors," and "collectors." No argument can be drawn from a comparison of the language of the corresponding sections in stat. 55 G. 3. c. 51. Sect. 2 of that Act, which answers to sect. 5 of stat. 15 & 16 Vict. c. 81., specifies all the persons from whom the justices may require returns; and contains no such general reference to all other persons having the custody or management of rates or valuations as is found in section 5 of the later Act. In the earlier Act, therefore, no such reference was necessary in sect. 9, which related to sect. 2; but such a reference was necessary in sect. 7 of the later Act, by reason of the language of its 5th section. Nor is the contention on the other side fortified by the enactment in The Railways Clauses Consolidation Act, 1845, s. 107; by which railway Companies are required to make out and transmit to the overseers an annual account of their receipts and expenditure; although their case would have been in point had the Legislature gone further, and given the poor-rate assessors power to compel the officials of the Companies to attend with their books and give evidence of the annual value of their property. The power claimed for the appellants exceeds in stringency any conferred by the Income Tax Acts on the assessors to that tax.

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Manisty was heard in reply.

(COCKBURN C. J. and WIGHTMAN J. were absent.)

CROMPTON J. I am of opinion that the justices came to a wrong decision. Stat. 15 & 16 Vict. c. 81. gives new powers to the justices of counties to take steps for preparing a basis or standard for fair and equal county

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rates. This basis or standard is intended to be lasting; although there may be an appeal against it when allowed. Owing to the importance of having it carefully adjusted, a committee of justices is to be appointed for the purpose. I agree with Mr. *Mellish* as to the object of the Act, and the duty of the committee; namely, to ascertain whether the property in the several parishes is rated to the relief of the poor according to its full and fair annual value; and not arbitrarily, or at an amount much below that value. Sect. 6 shews that by "full and fair annual value" is to be understood the net annual value, as the same is required by law to be estimated for the purpose of assessing the poor-rates. By sect. 5 the committee are empowered to procure returns of the rates and valuations: but their duty is to ascertain the difference between the actual assessment and the actual annual value of property. I do not see how this difference can be ascertained otherwise than by taking evidence as to the actual annual value; which, in many cases, will not be shewn by the assessment. Overseers, for instance, may admit, on examination, that the property in their parish is not rated at its full and fair annual value. It is necessary, therefore, that the committee should have further means than an inspection of the rates for ascertaining the value of property. If, now, we turn to sect. 7 of the Act, its language is very strong; and, taken in the literal sense, clearly empowers the committee to summon before them everybody, whether private individual or parochial officer, who can give any evidence as to the real annual value of the property in parishes. Without some power of this kind the committee would not be able to pursue their investigations and arrive at a satisfactory result.

It may be an inquisitorial power, and liable to abuse; *but* great inconvenience would result from its absence. To advert again to the language of the Act. By sect. 5 *the* overseers and others, who are to be called upon to *make* returns, are to return, *inter alia*, the name of the *surveyor*, or the name or names of the person or persons *by* whom, and the manner in which, the valuation was *made*. Now the surveyor or other person would not *necessarily* be a public officer, and, unless under the *words* "any other persons whomsoever" in sect. 7, the *committee* would have no power to take their evidence. *These* words are extremely wide. I should be unwilling to strain doubtful language in a matter of this kind; *but* it would be straining plain language to hold that "*whomsoever*" refers only to persons mentioned in the *Act*. Moreover, the section goes on to provide that the *witnesses* are to produce, not only all parochial and other rates and assessments, but also other documents in their custody or power, relating to the value of the property. It, therefore, appears to me that the Legislature have intentionally given power to this committee of gentlemen to exercise this somewhat arbitrary jurisdiction, if necessary; guarding its exercise by the requirement that the witnesses are to be summoned by the order in writing of the committee, which, it is to be assumed, will not be issued vexatiously and without due reason. Although I entertained some doubt in the course of the argument, I have now come clearly to the conclusion that the justices were wrong.

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HILL J. I am of the same opinion. The question is, whether we are to construe the words in sect. 7, "any other persons whomsoever," according to their

1861. plain general acceptance, or are to limit them to such persons as are mentioned in the 5th section, and have in their custody or power such documents as are there specified. After hearing the argument on both sides, and on full consideration, I am clearly of opinion that we must give to the words their plain and general meaning. The intention of the Legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute; *Fordyce v. Bridges (a)*. The statute before us, after repealing former Acts, enacts by sect. 2 that it shall be lawful for justices in Quarter Sessions, as often as they may deem it necessary, to appoint a committee of their body "for the purpose of preparing a basis or standard for fair and equal county rates, such basis or standard to be founded and prepared rateably and equally according to the full and fair annual value of the property" "rateable to the relief of the poor in every parish, township, borough, or place." These words shew that the object of the Legislature was that the basis or standard for the county rates should be founded on the full and fair annual value of the property to be assessed; and not solely on the amount at which such property was actually assessed to the poor-rate. It is, therefore, of the greatest importance that the statute should receive a construction which will give effect to this object. By sect. 5 the duty is imposed upon certain specified public officers, of making certain written returns, when required by the committee. Mr. *Mellish* has attempted to account for the introduction of the words "other persons" in sect. 7

(a) 1 H. L. Ca. 1.

by supposing them to relate to such of these officers as are not expressly mentioned in that section. But, as my Brother *Crompton* has pointed out, one of the duties imposed by sect. 5 on the officers there specified is to return to the committee the name of the surveyor who makes the valuation. It must evidently have been intended that the committee should refer to this surveyor, if necessary, for further information; but if Mr. *Mellish's* construction of sect. 7 is correct, they would have no power to summon him before them. The reasonable construction of sect. 7 is that it is intended to enlarge the powers already given to the committee by sect. 5, by authorizing them to call before them, not the persons, only, enumerated in sect. 5, but also "any other persons whomsoever;" and to compel the production by the witnesses, not only of the parochial and other rates, assessments, valuations and apportionments, but also of all other documents which any witness may have in his custody or power, and which relate to the true value of the property. No other documents but those which are of that nature can be called for; and such documents are most material to the due exercise of the duty of the committee. The section, further, gives the committee power to examine the witnesses on oath, touching either the rates, assessments, valuations and apportionments, or the value of the property. It may be said that these powers are to a certain extent inquisitorial; but I see nothing absurd or oppressive in the committee being invested with authority to acquire the best information available. Sect. 13 enacts that a copy of the basis or standard, when prepared, is to be sent to every parish, and submitted to its vestry; by sect. 14, objections to the basis or standard may be sent to the com-

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1861. mittee, either by the parish officers, or by any person
 The QUEEN affected by it; and by sect. 17 it may, after its allowance,
 v. be appealed against to Quarter Sessions, by any parish
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 grounds there enumerated. The Act, therefore, providing so many safeguards against an abuse of their powers by the committee, I see nothing unreasonable, unjust, or improper in giving to the words of sect. 7, "any other persons whomsoever," their plain general meaning, according to which they include the respondent in the present case. I am, consequently, of opinion that the justices came to a wrong decision. The case must be remitted to them with that expression of our opinion.

Appeal allowed, without costs; and case remitted to the justices.

Saturday, WALSBY, appellant, *against* ANLEY, respondent.
January 19th.

Stat. 6 G. 4.
 c. 129. s. 3.
 constitutes it
 an offence
 punishable by
 conviction,
 "by threats or
 intimidation,
 or by molest-
 ing or in any
 way obstruct-
 ing another,"
 to "force or
 endeavour to
 force any" "person engaged in carrying on any trade or business," "to limit" "the number or description of his" "workmen."

CASE stated by a Metropolitan Police Magistrate,
 under stat. 20 & 21 *Vict. c. 43.*

On 9th *June*, 1860, the appellant was convicted by the magistrate, under stat. 6 G. 4. c. 129. s. 3., for unlawfully, on 16th *May*, 1860, within the Metropolitan police district, in the county of *Middlesex*, by threats endeavouring to force the respondent, then and there

Held, that a threat by a workman to his employer, made in pursuance of a combination (which is illegal) between that workman and fellow-workmen to carry it out, that all the workmen so combining will immediately leave work unless the employer discharges other workmen who are then in the same service, renders such workman liable to conviction for the above offence.

carrying on the trade of a builder, to limit the description of his workmen; and was ordered to be imprisoned for one calendar month, with hard labour.

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It was proved, by the respondent and other witnesses, that the respondent carried on the trade of a builder in *Whitecross Street, Middlesex*, and that he employed about a hundred workmen. In the year 1859 there had been a strike of workmen employed in the building trade, and the respondent then resolved not to employ, and did not employ for some time, any workmen who declined to work under what was called the declaration. It was well understood in the building trade what this declaration was; it being to the following effect. "I declare that I am not now, nor will I during my engagement with you become, a member of, or support, any society which directly or indirectly interferes with the arrangements of this or any other establishment, or the hours or terms of labour; and that I recognize the right of employers and employed individually to make any trade engagements on which they may choose to agree."

On the day named in the conviction the respondent had in his employment two or more men working under this declaration. On that day the defendant and two of the other workmen brought to the respondent a paper signed by the defendant and about thirty other workmen, of which the following is a copy. "At a meeting of the joiners in the employ of Mr. *Anley*, Tuesday evening, May 15th, 1860, it was resolved, that Mr. *Anley* be given to understand that, unless the men who are working under the declaration in his shop be discharged, and we have a definite answer by dinner time to that effect, we cease work immediately." The

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appellant, in reply to questions thereupon put by the respondent, said that he and the other workmen had no fault to find with the respondent, his foreman, or clerks; nor had he (the appellant) any fault to find with the wages he received; and when the respondent inquired what it was he wanted, the appellant answered, "You must discharge those two men who are working under the declaration; and if you do not, we will leave work." The respondent answered, "I will not be dictated to; and I will rather close my shop than submit to your dictation." On the same day the defendant and all the workmen who had signed the paper left the respondent's employment, and had not returned up to the time of the conviction.

It was contended by the counsel for the appellant that what his client had done was not a threat, within the meaning of the Act of Parliament; but the magistrate, being of opinion that it was an offence under the Act, convicted the appellant.

The question for the opinion of the Court was, Whether this determination was erroneous in point of law.

H. S. Giffard, for the respondent. There was sufficient evidence before the magistrate to warrant him in convicting the appellant. The whole question is, whether what was said by the appellant to the respondent on the day named in the conviction could in law amount to a threat within the meaning of stat. 6 G. 4. c. 129. s. 3., which renders liable to conviction "any person" who "shall by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or

endeavour to force any manufacturer or person engaged in carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting or carrying on such manufacture, trade or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen or servants." The appellant's statement to the respondent, "You must discharge those two men who are working under the declaration; and if you do not, we will leave work," though not necessarily a threat, was capable of being so construed; and the fact whether it was so intended was for the magistrate to decide. The essence of the offence is the forcing or endeavouring to force an employer to limit the number or description of his workmen; and the threats employed for that purpose are matter of evidence only; *In Re Perham (a)*. In the next place, the threat was unlawful on another ground, namely, that it was a threat in effect by each workman, that all who had signed the paper set out in the case would leave their employment. A combination of workmen to procure the discharge of fellow workmen who are obnoxious to them, by intimidating their employer, is an illegal conspiracy.

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Sleigh, for the appellant. In *In Re Perham (a)* the conviction was for endeavouring by threats to force a workman to leave his employment. [*Hill J.* The words of stat. 6 G. 4. c. 129. s. 3., with reference to that offence and to that now in question, are substantially the same. And in *In Re Perham (a)* as in the present case, the threat was, that others in addition

(a) 5 H. & N. 30.

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to the speaker would combine to carry it out.] It is no longer illegal for workmen to refuse to work with other workmen employed in the same service: the prohibition in stat. 40 G. 3. c. 106. s. 3., against their so refusing without just and reasonable cause, having been repealed by stat. 6 G. 4. c. 129. s. 2. [*Hill J. Stat. 6 G. 4. c. 129. s. 2. repeals all previous Acts relative to combinations of workmen or masters, as to wages, time of working, or quantity of work, &c. Sect. 3 creates several offences; amongst others, that of by threats forcing or endeavouring to force an employer to limit the number or description of his workmen. Sect. 4 exempts from punishment persons meeting together for the sole purpose of settling the rate of wages which they will demand for their work, or the hours for which they will work. Does not this exemption lead to the inference that workmen combining for any other purpose, for instance, for that of endeavouring to force a master to limit the number of his workmen, are guilty of an offence?*] Sect. 4 merely expresses more clearly the intention of the Legislature in sect. 2 in repealing the Acts against combinations; an intention still further explained by sect. 5, which protects from liability masters who meet to determine the rate of wages they will pay to, and the hours of work they will exact from, their workmen. *Rolfe B.*, in summing up to the jury in *Regina v. Selsby (a)*, said that, before the statute, it was understood to be the law that, although the masters might meet to fix the rate of wages, the workmen might not. [*Crompton J. In Rex v. Mawbey (b) Grose J.*, in giving judgment, says, "In many cases an agreement to

(a) 5 Cox. C. C. 495, 496, note to *Regina v. Rowlands*.

(b) 6 T. R. 619, 636.

do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages: each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy." I have always thought that to be a true statement of the law, notwithstanding the doubts expressed upon the subject by Lord Campbell C. J., in *Hilton v. Eckersley* (a).]

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Giffard, in reply. The appellant and his fellow workmen entered into an illegal combination to coerce their master in the choice of the men whom he would employ. Granting that it was lawful for them to leave the service, it was not lawful to intimidate the master into dismissing others, by the threat of leaving. Many things are lawful by themselves which in combination are unlawful: for instance, it is lawful to pay money, and to abstain from marriage; but it is unlawful to pay money to another not to marry. Combinations amongst workmen to do that which is prohibited by sect. 3 of the Act are not within the protection of sect. 4.

COCKBURN C. J. I am of opinion that this conviction must be affirmed. I am decidedly of opinion that every workman who is in the service of an employer, and is not bound by agreement to the contrary, is entitled to the free and unfettered exercise of his own discretion as to whether he will or will not continue in that service in conjunction with any other person or persons who may be obnoxious to him. More than this; any number

(a) 6 E. & B. 47. 62.

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of workmen who agree in considering some of their fellow-workmen obnoxious, have each a perfect right to put to their employer the alternative of either retaining their services by discharging the obnoxious persons, or losing those services by retaining those persons in his employment. But if they go further, and, not content with simply putting the alternative to the employer, combine to coerce him, by threats of jointly doing something which is likely to operate to his injury, into discharging the obnoxious persons, I think that they may properly be said to bring themselves within the scope of the 3rd section of the statute. In the case before us, it was not one man merely who went to the employer and said that he should leave if the obnoxious workmen did not; nor several men merely, who, adopting the same course, gave their master the option of retaining them or the obnoxious men in his service: but several men, who combined together with the object of coercing the master into dismissing the obnoxious workmen, by the threat of otherwise leaving in a body at a moment's notice. Although I at first entertained some slight doubt whether what was said amounted to a "threat," I have no doubt whatever that the conduct of the appellant and the other malcontent workmen amounted to a "molesting" of the master, within the meaning of the Act; and that their proceedings were altogether illegal, whether it is said that they threatened and intimidated, or that they molested and obstructed the respondent, their employer, in his business.

(WIGHTMAN J. was absent.)

CROMPTON J. I am of the same opinion. I doubted very much, on first reading the case, whether the con-

viction was right; because the threats and intimidation used by the workmen did not point to the commission by them of an act in itself unlawful; the threat being that they would do that which, taken by itself, they had a perfect right to do; namely, leave the employment. Although, however, I think that any workman has a right to go to his master and say, "It is my whim not to work in company with so and so," I think that several workmen have no right to combine to procure the discharge of persons obnoxious to them by threatening to leave the employment at once in a body, unless those persons are forthwith discharged. It is matter of common learning, that what a man may do singly he may not combine with others to do to the prejudice of another. Stat. 6 G. 4. c. 129., by repealing all the previous statutes on the subject, appears to me to have re-established the common law as affecting combinations of masters or workmen. I adhere to the opinion that, at common law, all such combinations are illegal, and that *Grose J.* rightly states the law in the passage to which I referred in the course of the argument (a). That being so, it was necessary, by sects. 4 and 5 of the statute, to render legal the combinations of workmen and masters therein referred to respectively, and which would, at common law, have been illegal. The combination charged in the present case is one by workmen to threaten to leave the respondent's service if he did not dismiss certain other workmen. That is a combination not within the protection of sect. 4, and falling within the prohibition in sect. 3 against endeavouring by threats or intimidation to force an employer to limit the number or description of his workmen. As in the in-

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(a) In *Rex v. Maubey*, 6 T.R. at p. 636.

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dictment in *Regina v. Rowlands* (a), and the conviction in *In Re Perham* (b), so in the conviction now before us, the threats used by the appellant are not set out; those cases, however, shew that that is immaterial; the nature of the language used, and whether or not it amounted to a threat, being matter of evidence, and solely for the consideration of the magistrate. In the present case the magistrate decided (and I think rightly) that the appellant's language did amount to a threat, and that he had committed an offence under sect. 3 of the Act.

HILL J. I am of the same opinion. I have very little to add to what has fallen from the rest of the Court, in which I entirely concur. "Threat," in the statute, must mean a threat to do an illegal act. The question therefore is, was the act threatened by the appellant illegal? I entirely agree with what the Lord Chief Justice has said as to the right of an individual workman, or any number of workmen, to tell their employer that they decline to continue to work with particular men to whom they object. If, however, they act in combination, not honestly or independently, but by way of a conspiracy, in order to coerce their employer to dismiss the men obnoxious to them, that combination is illegal. There was abundant evidence before the magistrate that the appellant had threatened the respondent with the carrying out of a combination amounting to an illegal conspiracy at common law. The appeal must therefore be discharged.

Conviction affirmed.

(a) 5 Cox. C. C. 436.

(b) 5 H. & N. 30.

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The QUEEN, on the prosecution of RICHARD *Monday,*
 ORGAN, *against* The General Council of Medical *January 21st.*
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HAYES Serjt. had obtained a rule, calling on *The* The Medical Act, 21 & 22 Vict. c. 90., by sect. 15 enacts, that every person possessed of one or more of certain specified qualifications shall be entitled to be registered as
General Council of Medical Education and Registration of the United Kingdom to shew cause why a writ of mandamus should not issue, commanding them to restore the name of *Richard Organ* to the medical register.

a medical practitioner on payment of certain fees, and production to the registrar of evidence of his qualification. By sect. 17, every person who was actually practising medicine in *England* before 1st August, 1815, is entitled to be registered in like manner. By sect. 46, power is given to the General Council of Medical Education (who, by sect. 6, may delegate their powers to the Branch Council) to dispense with such provisions of the Act as they think fit, in favour of, amongst other classes of practitioners, persons acting as surgeons in the public service. Sect. 26 enacts that "no qualification shall be entered on the register, either on the first registration or by way of addition to a registered name, unless the registrar be satisfied by the proper evidence that the person claiming is entitled to it; and any appeal from the decision of the registrar may be decided by the general council;" "and any entry which shall be proved to the satisfaction of" the council "to have been fraudulently or incorrectly made may be erased from the register by order in writing of" the council. And, by sect. 29, "if any registered medical practitioner shall be convicted" "of any felony or misdemeanour," "or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

O., a medical practitioner, was registered under sect. 46, by special order of the branch council, on his representation that he was acting as a surgeon in the public service. Subsequently the general council, after holding an inquiry of which he had due notice, and at which he attended under protest but made no defence, erased his name from the register, on the grounds, first, that it was proved to their satisfaction that the entry of it was fraudulently and incorrectly made; secondly, that they, after due inquiry, judged him to have been guilty of infamous conduct in a professional respect.

Held, discharging a rule for a mandamus to the general council to restore *O.*'s name to the register, that the council had jurisdiction under the circumstances to erase his name: both under sect. 26, the second clause of which was not limited to the case of persons registered under sects. 15 or 17, and under sect. 29, which did not make it a condition to the erasure that the infamous professional conduct of which *O.* was judged guilty should have been proved to the council to have occurred before his registration.

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It appeared from the affidavits that *Richard Organ*, having been, in 1859, inserted in the medical register, as being a surgeon in the public service, by the Branch (a) Medical Council for *England*, under The Medical Act, 21 & 22 *Vict. c. 90. s. 46.*, on his petition dated 12th *January*, 1859, was afterwards, in consequence of certain charges made against him, removed from the register by the general council; and that, in *Easter Term*, 1860, this Court made absolute a rule for a mandamus to the council to restore him, on the ground that he had not been heard in his defence before removal. The council, in obedience to this rule, at once restored his name to the register, and soon afterwards, on or about 29th *May*, 1860, gave him the following notice.

“ *Medical Registration Office*,

“ 32, *Soho Square*, *London*, *W.C.*,

“ Sir,

May 28th, 1860.

“ Information having reached the medical council that you are not possessed of any qualification entitling you to registration, and that certain of the representations contained in your memorial to the council, dated 12th *January*, 1859, are untrue, and that your name has been incorrectly placed on the medical register, and, further, that you have been guilty of conduct infamous in a professional respect, in endeavouring to obtain by fraudulent means a diploma from the Royal College of Surgeons of *Edinburgh*, I have to inform you that, on the 18th day of *June* now next ensuing, at three o'clock in the afternoon, the medical council will meet at *The Royal College of Physicians*, in *Pall Mall East*, *London*, and will then and there institute an investigation into

(a) Sect. 46 empowers The General Medical Council to register such surgeons; but, under sect. 6, that council may delegate its powers to the Branch Council.

the truth of these allegations, with a view to decide whether, on all or any of the above grounds, your name ought to be erased from the medical register. At that investigation you are hereby invited and requested to be present. You will also take notice that the meeting of the council is fixed peremptorily for the day hereinbefore named, on which day the inquiry will be prosecuted, whether you attend or not.

"Francis Hawkins, M.D., Registrar."

On the receipt of this notice, Mr. *Organ's* attorney wrote to inquire whether Mr. *Organ* would be allowed to appear by counsel, and, also, for further information as to which of the representations in his memorial were said to be incorrect; and he received an answer from the registrar, referring him "especially to the statements as to his (Mr. *Organ's*) appointments as medical officer and public vaccinator to various parishes;" adding, "but the medical council do not, of course, bind themselves to confine their inquiries exclusively to that part of the memorial. I am directed by the council to inform you that, whilst they are ready to allow Mr. *Organ* the fullest opportunity of explaining and answering the allegations made against him, they do not think fit to grant his application to be heard by counsel."

The attorney wrote in reply that Mr. *Organ* would appear under protest, and offer no evidence. Mr. *Organ* and his attorney accordingly attended the meeting on 18th *June*, 1860, and, after protest on their part, the council proceeded to read affidavits, in which the facts were detailed on which the charges pointed out in the notice of 28th *May* were founded; the transaction with regard to the diploma at *Edinburgh* having taken place early in the year 1858. After the reading of the affida-

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vits, in answer to an offer by the chairman to hear any explanation, Mr. *Organ* and his attorney again protested, and declined to interfere. The council on the following day, 19th *June*, 1860, passed the following resolutions, and forwarded copies of them to Mr. *Organ*.

“That, it having been proved to the satisfaction of the general council that the entry of the name of *Richard Organ* has been fraudulently and incorrectly made on the register, the general council do by this order in writing direct that his name be erased from the register; that *Richard Organ* having been judged by the general council, after due inquiry, to have been guilty of infamous conduct in a professional respect, the general council do hereby adjudge that the name of the said *Richard Organ* be erased from the register, and do by this order direct the registrar to erase his name from the register accordingly.”

Montague Smith and *Sleigh* now shewed cause. The council had jurisdiction to order Mr. *Organ*'s name to be erased from the register, upon both or one or other of the grounds stated in the resolutions of 19th *June*. The Medical Act, 21 & 22 *Vict. c. 90*. enacts, by sect. 15, that “Every person now possessed, and (subject to the provisions hereinafter contained) every person hereafter becoming possessed, of any one or more of the qualifications described in the Schedule (A.) to this Act, shall, on payment of a fee, not exceeding 2*l.*, in respect of qualifications obtained before the 1st day of *January*, 1859, and not exceeding 5*l.* in respect of qualifications obtained on or after that day, be entitled to be registered on producing to the registrar of the branch council for

England, Scotland, or Ireland, the document conferring or evidencing the qualification or each of the qualifications in respect whereof he seeks to be so registered, or upon transmitting by post to such registrar information of his name and address, and evidence of the qualification or qualifications in respect whereof he seeks to be registered, and of the time or times at which the same was or were respectively obtained." By sect. 17, "Any person who was actually practising medicine in *England* before the 1st day of *August*, 1815, shall, on payment of a fee to be fixed by the general council, be entitled to be registered on producing to the registrar of the branch council for *England, Scotland, or Ireland*, a declaration according to the form in the Schedule (B.) to this Act signed by him, or upon transmitting to such registrar information of his name and address, and enclosing such declaration as aforesaid." These being the provisions under which medical practitioners in general may get themselves put on the medical register, the Act, by sect. 46, enacts that "It shall be lawful for the general council, by special orders, to dispense with such provisions of this Act or with such part of any regulations made by its authority as to them shall seem fit, in favour of," amongst others, "any persons who" "are acting as surgeons in the public service." Mr. *Organ*, it appears, obtained registration under this latter section, on his statement that he was a surgeon in the public service. Such being the provisions of the Act as to registration, and such the mode by which Mr. *Organ* got on the register, the question is whether the Council of Medical Education can justify his removal therefrom, under the powers conferred on them by other sections. Those sections are the 26th and the 29th. By sect. 26 it is

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enacted that "No qualification shall be entered on the register, either on the first registration or by way of addition to a registered name, unless the registrar be satisfied by the proper evidence that the person claiming is entitled to it; and any appeal from the decision of the registrar may be decided by the general council, or by the council for *England, Scotland, or Ireland* (as the case may be); and any entry which shall be proved to the satisfaction of such general council or branch council to have been fraudulently or incorrectly made may be erased from the register by order in writing of such general council or branch council." And sect. 29 enacts that "If any registered medical practitioner shall be convicted in *England or Ireland* of any felony or misdemeanour, or in *Scotland* of any crime or offence, or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register." The council were justified, under either of these sections, in removing Mr. *Organ*'s name from the register. It having been proved to their satisfaction that the entry of his name on the register had been fraudulently and incorrectly made, sect. 26 applies; as does sect. 29, the council having, after due inquiry, judged Mr. *Organ* to have been guilty of infamous conduct in a professional respect. The other side will contend that, in order for sect. 29 to apply, it must be proved that the infamous professional conduct, there mentioned, occurred before the name was put on the register. But that section is not to be thus restricted in its operation. It provides for the erasure of a practitioner's name, if he shall be

judged "to have been" guilty of the infamous conduct ; by which must be meant, to have been thus guilty at any time before the adjudication. [*Crompton J.* That would seem to be the reasonable construction, having regard to the enactment in sect. 15, under which it appears that any duly qualified person is entitled to be registered, without regard to his character, if he pays the proper fee and produces to the registrar sufficient evidence of his qualification.] Yes: it was necessary to give power to the council, by sect. 29, to remove the names of persons of infamous professional character; who, being entitled in the first instance to registration, could not otherwise be erased from the register. Whether or not, however, the council can justify their proceeding under sect. 29, they clearly can do so under sect. 26: which must give them power to expunge from the register any name, however it got there, the entry of which was fraudulent or incorrect.

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Hayes Serjt., in support of the rule.—First, as to sect. 29. The expression "infamous conduct in any professional respect," is very vague; and the council ought to find proved some definite instance of such misconduct on the part of a practitioner, before taking the extreme course of striking his name off the register. Assuming, however, that they are not bound to find him guilty of any precise misconduct, they must, at all events, find that he was guilty of the misconduct imputed to him before he was registered. Sect. 15 gives an absolute right to every qualified person to be placed on the register; and it would be strange if a subsequent section should give the council the power of nullifying that right by striking such a person off on account of

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conduct by him before he was put on. Sect. 29 applies to "any registered medical practitioner" only; by which must be meant any medical practitioner who after registration incurs the pains and penalties of the section. The subsequent words "judged" "to have been guilty," merely mean that the guilt must be complete at the time of adjudication; not that it may have taken place at any time before then. This clause of the section ought not to receive a different construction from its first clause, by which, "If any registered medical practitioner shall be convicted" "of any felony or misdemeanour," his name may be erased. That clause plainly applies only to a conviction after registration, and also, it must reasonably be supposed, to a conviction for an offence committed since the offender's registration. Otherwise, there is this anomaly, that guilt, followed by conviction before the offender's registration, does not disqualify him, once registered, from remaining on the register; but the same guilt, if not followed by conviction until after the registration, does disqualify him. The general rule in interpreting statutes, that they are not to be construed retrospectively, ought to prevail here; especially as the Act takes away or restricts pre-existing rights. Secondly, sect. 26 applies only to the erasure of names improperly put upon the register by the registrar, and to appeals from his decision to that of the council. The council cannot, therefore, justify under that section the erasure of Mr. *Organ's* name, he having been put on the register, not by the registrar, but by special order of the council under sect. 46. [*Hill J.* The first clause of sect. 26 no doubt has the limited application, only, for which you contend; but its second clause, under which the council have acted in this case, autho-

rizes the council to erase from the register "any entry which shall be proved to" their satisfaction "to have been fraudulently or incorrectly made," by whomsoever it was made.] At all events, the council ought to have found the facts relating to the fraud.

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(COCKBURN C. J. and WIGHTMAN J. were absent.)

CROMPTON J. I am of opinion that this is not a case for the grant of a writ of mandamus by the Court in the exercise of its discretion. But, further, apart from the merits, I think that the rule should be discharged, on the ground that sect. 26 of the statute, under which the general council have acted, is applicable to the present case. The council have found that the entry of the applicant's name on the register was fraudulently and incorrectly made. It is now said, on his behalf, that they ought to have found the specific facts. This Court has, however, already granted the applicant a mandamus calling on the council to hear him in his defence; and he has since had an opportunity of being heard, of which he has declined to avail himself. There is no end, therefore, to be gained, by sending the case again before the council for the facts to be ascertained. I think that we have no right to interfere with their determination, founded, as we must assume it to have been, upon sufficient evidence, unless they had no jurisdiction at all. In my opinion, however, they had jurisdiction. Sect. 15 of the Act gives an absolute right to persons possessed of certain qualifications, to be registered as medical practitioners by the registrar on payment of specified fees and production of evidence of their qualifications. Then sect. 26 empowers the council

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to erase from the register any entry proved to their satisfaction to have been fraudulently or incorrectly made. It is clear that this erasure may be made on the application of a third party; and equally clear that the operation of the enactment is not restricted to cases in which the entry was made, under sect. 15, by the registrar. There is no reason why sect. 26 should be restricted to such cases, any more than sect. 29 is, or than sect. 39 is, which makes it a misdemeanour in any person to "wilfully procure or attempt to procure himself to be registered under" the "Act," by false or fraudulent representations. These sections must all apply to every registration, whether under sect. 15 or under sect. 46. There is, indeed, greater reason for their application to registrations of the latter than to those of the former description; inasmuch as the council, by whose special dispensation the registration may, under sect. 46, take place, are more likely to be exposed to deception than the registrar, who registers applicants under sect. 15. I also think that the case falls within the scope of the 29th section. Medical practitioners are not amenable to the jurisdiction of the council, under that section, until they have been registered. But if, at the time of their conviction for an offence, or of their adjudication by the council to have been guilty of infamous professional conduct, they are registered, the section applies, and it is immaterial at what time the offence or misconduct, respectively, may have been committed. It is said that this construction makes the Act retrospective. It does so to a certain extent, but not in the general sense in which the rule against giving a retrospective operation to statutes is understood.

HILL J. I am of the same opinion. On the first point I entirely agree with my Brother *Crompton*. The granting of a mandamus is to some extent discretionary with the Court; and I am clearly of opinion that, under the circumstances of the present case, we ought not to interfere. The facts are, that Mr. *Organ*, having been put upon the register by a special order of the council under sect. 46 of the Act, and having subsequently been removed from it without a hearing, obtained from this Court a rule for a mandamus to the council to restore him on that ground. This was, in effect, a rule calling upon the council to hear his defence. They, accordingly, in obedience to the rule, restored him, and called upon him to answer certain specific charges, with a view to a decision whether his name ought not to be erased from the register. The council having afterwards refused, as they had a right to do, his application to be heard by counsel, he attended before them at the hearing of the charges, and said nothing in defence, contenting himself with merely disputing the council's jurisdiction. The council then found two facts proved; first, that he had obtained his registration fraudulently; and, secondly, that he had been guilty of infamous professional conduct. The first fact justified his removal from the register under sect. 26, the second under sect. 29; and the council were acting within their jurisdiction in erasing his name, if either of those sections apply. I am of opinion that both those sections do apply. The scope and object of the Act is clear. Sect. 15 gives an absolute right to all persons possessing certain qualifications to be placed on the register by the registrar. Sect. 17 entitles all persons who were actually practising medicine in *England* before 1st *August*, 1815, to the

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same advantage. Sect. 46 empowers the general council to dispense by special orders with the provisions of, and with regulations made under, the Act, in favour of certain specified classes of practitioners. The present applicant, Mr. *Organ*, was registered in pursuance of an order of the council under sect. 46; and it has been argued on his behalf, that the second clause of sect. 26 does not apply to such a registration, but only to registrations by the registrar. I think, however, that that clause, equally with sect. 39, the language of both being equally general, must be read as applying to the case of every registered practitioner, whether he be registered under sects. 15 or 17, or under sect. 46. If it be necessary to give an opinion with respect to sect. 29, I should say that that section also applies. The first clause of that section applies, if the conviction of an offender takes place after his registration, although for an offence committed before it; and in like manner the second clause applies, if the council adjudge a man to have been guilty of infamous professional conduct before his registration, provided that the adjudication be after it. The decision of this point, however, is not absolutely necessary, the first ground being sufficient to dispose of the case: but I think it right, notwithstanding, not to withhold the strong opinion which I entertain upon it.

Rule discharged, with costs.

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January 22d.

THE first count of the declaration stated that plaintiff, who, before and at the time of the committing by defendant of the wrongful acts thereafter mentioned, was a manufacturer of, and carried on the business of manufacturing and selling, fire bricks, at the request of defendant agreed with defendant that he, plaintiff, would manufacture and sell and deliver divers large quantities of fire bricks to defendant, at or for certain prices to be paid to plaintiff by defendant for the same; and that all fire bricks supplied by plaintiff to defendant should be marked in such manner as defendant might direct. That, after the making of the said agreement, defendant wrongfully, deceitfully and injuriously, and contrary to his duty in that behalf, directed that divers fire bricks, to be manufactured, sold and delivered by plaintiff to defendant in pursuance of the said agreement, should be marked with the word or name "*Ramsay*," defendant then well knowing, as the

Declaration, for that, plaintiff having agreed with defendant to make for and sell to him bricks, to be marked as defendant might direct, defendant wrongfully, deceitfully and injuriously directed plaintiff to mark them with the name of *R.*; defendant then well knowing, and plaintiff not knowing, as the fact was, that *R.* used that name as a mark on bricks made and sold by him, to distinguish them from bricks made and sold by other

persons; and that plaintiff, by so marking the bricks to be made for defendant, would become liable to legal proceedings for damages at the suit of *R.*, and to be restrained by injunction from making any more of such bricks. That plaintiff, in ignorance of the consequences, and of *R.*'s rights, marked the bricks as directed by defendant, and delivered them to him. That *R.* thereupon filed a bill in Chancery against plaintiff for an injunction, an account of the profits made by plaintiff from the bricks, and a decree that plaintiff should pay the amount thereof to *R.* That plaintiff thereupon compromised such suit by paying *R.* a large sum of money for his damages, costs and expenses, and was also compelled to pay large sums of money for the costs of his own necessary defence to the suit.

Demurrer. Joinder in demurrer.

Held, that the declaration disclosed a good cause of action, on the ground that plaintiff, though innocent of fraud in counterfeiting *R.*'s mark, was nevertheless liable in equity to the suit for having in fact counterfeited it: and semble also on the ground that, the natural consequence of defendant's act being to plunge plaintiff into the Chancery suit, and thereby to cause him to incur costs and expenses, plaintiff, whether or not he was liable to the suit, had a good cause of action against defendant to recover the damages so sustained.

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fact was, that *George Heppell Ramsay*, before and at the time mentioned aforesaid, had been and was a manufacturer of fire bricks, and had been and was accustomed to manufacture and sell, and did in fact manufacture and sell, fire bricks marked with the name or word "*Ramsay*," in order to indicate that the fire bricks by the said *G. H. Ramsay* manufactured and sold were fire bricks manufactured and sold by him; and also to distinguish the fire bricks so manufactured and sold by him from fire bricks manufactured and sold by other persons. That, at the time when defendant directed plaintiff to mark in manner aforesaid fire bricks so to be manufactured, sold and delivered by plaintiff to defendant as aforesaid, defendant well knew, as the fact was, that such fire bricks, when so marked, sold and delivered by plaintiff to defendant, would counterfeit, imitate and resemble fire bricks manufactured, marked and sold by the said *G. H. Ramsay*, in manner aforesaid; and that plaintiff, by manufacturing and marking such fire bricks in manner aforesaid, and selling and delivering the same to defendant, would render himself liable to have legal proceedings taken against him, at the suit of the said *G. H. Ramsay*, to recover damages against him for so manufacturing, marking and selling such fire bricks; and also for the said *G. H. Ramsay* to obtain an injunction against the manufacturing and selling of fire bricks marked in manner aforesaid by plaintiff; and also liable to pay the amount of such damages as aforesaid to the said *G. H. Ramsay*. And defendant then wrongfully and fraudulently intended that the said fire bricks which he so directed plaintiff to manufacture and mark in manner aforesaid, and deliver to defendant as aforesaid, should, in fact, when manu-

factured and marked, and sold and delivered to defendant, counterfeit, imitate and resemble fire bricks so manufactured, marked and sold by the said *George Heppell Ramsay* as aforesaid; so that defendant might and should be enabled, wrongfully and fraudulently, to sell the said fire bricks so to be by plaintiff manufactured, and marked and sold and delivered to defendant, as and for fire bricks manufactured by the said *G. H. Ramsay*. That plaintiff, being ignorant of the said manufacture, marking and sale of fire bricks by the said *G. H. Ramsay* as aforesaid, and being also ignorant that the manufacturing and marking of fire bricks in pursuance of and according to the said direction of defendant, and the selling of such fire bricks to defendant, would be wrongful, or would render plaintiff liable to such legal proceedings and to pay such damages as aforesaid, did, in pursuance of and according to the said direction of defendant, manufacture divers large numbers of fire bricks for defendant, and to be sold and delivered by plaintiff to defendant, in pursuance of the said agreement; and plaintiff, being so ignorant as aforesaid, did, in pursuance of the said direction of defendant, mark each of the same fire bricks, by him so manufactured, with the said name or word "*Ramsay*;" and such fire bricks, by plaintiff so manufactured and marked in pursuance of the said directions of defendant, did in fact counterfeit, imitate and resemble fire bricks by the said *G. H. Ramsay* manufactured and marked and sold as aforesaid. That plaintiff, being so ignorant as aforesaid, did sell and deliver to defendant divers large quantities of the said fire bricks by him, plaintiff, so manufactured and marked as aforesaid. That, by reason and means of the afore-

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said wrongful acts of defendant, and the severa premises aforesaid, and by reason of plaintiff acting in manner aforesaid, at the request and by the direction of defendant, and not otherwise, he, plaintiff, by manufacturing and marking fire bricks in manner aforesaid, and selling and delivering such fire bricks to defendant as aforesaid, became and was liable to have legal proceedings taken against him by and at the suit of the said *G. H. Ramsay*, to recover damages against plaintiff for and by reason of plaintiff so manufacturing and marking the said fire bricks in manner aforesaid, and selling and delivering the same bricks, so marked, to defendant as aforesaid; and also for the said *G. H. Ramsay* to obtain an injunction against the manufacturing and selling of fire bricks marked in manner aforesaid; and also liable to pay the amount of such damages as aforesaid to the said *G. H. Ramsay*. That afterwards, and after plaintiff had delivered divers of the said fire bricks by him manufactured and marked and sold to defendant as aforesaid, and whilst plaintiff had in his possession some others of the fire bricks by him so manufactured and marked, in pursuance of the said direction of defendant as aforesaid, the said *G. H. Ramsay* filed his bill of complaint in the Court of Chancery, praying that plaintiff might be restrained by the perpetual injunction, and in the meantime by the order and injunction, of the said Court, from stamping or marking, or causing or allowing to be stamped or marked, any fire bricks manufactured by or for him with the name or mark "*Ramsay*," or with any other name or mark so contrived or expressed as by colourable imitation or otherwise to represent the fire bricks manufactured by plaintiff to be the same as the fire bricks manufactured by the said

G. H. Ramsay; and also from selling or offering for sale, or procuring to be sold, or otherwise parting with or disposing of, any fire bricks heretofore manufactured by or for plaintiff, and stamped or marked with the said name or mark "*Ramsay*," or with any such other name or mark as aforesaid; and also that an account might be taken of all fire bricks theretofore manufactured and sold by plaintiff with the said name or mark "*Ramsay*" stamped thereon, and of the gains and profits made thereby by plaintiff; and that plaintiff might be decreed to pay to the said *G. H. Ramsay* the amount of such gains and profits. That thereupon, and in order to obtain a settlement and compromise of the claim of the said *G. H. Ramsay* against him in the said suit, for such gains and profits as aforesaid, and to satisfy the claim of the said *G. H. Ramsay* for his costs and expenses in the said suit, plaintiff was compelled to pay and did pay to the said *G. H. Ramsay* a large sum of money, to wit, 160*l*.; and was also compelled to pay, and did pay, divers sums of money for and in payment and satisfaction of the costs and charges of plaintiff in and about his necessary defence in the said suit in the said Court of Chancery, amounting in the whole to a large sum, to wit, 50*l*.

The second count was to a similar effect, differing only in averring that defendant knew that the name "*Ramsay*" was a mark used by some person or persons, other than plaintiff or defendant, as a trade mark for fire bricks manufactured and sold by such other person or persons.

Demurrers to both counts. Joinders in demurrer.

Manisty, in support of the demurrers. The declaration discloses no cause of action. The now plaintiff

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having innocently counterfeited *Ramsay's* trade mark, was not liable to be sued by *Ramsay* on that account, either at law or in equity. Fraud on the part of the defendant is the foundation of a suit in equity, no less than of an action at law, for imitating the trade mark of another. *Ramsay's* bill in equity ought, therefore, to have been filed against the present defendant instead of against the now plaintiff, his innocent agent, who consequently was a mere volunteer in paying money to compromise a suit to which he was not liable. *Crawshay v. Thompson* (a), *Sykes v. Sykes* (b) and *Rodgers v. Nowill* (c) shew that a fraudulent intention by the defendant to imitate the plaintiff's trade mark is of the gist of an action for such imitation. Again, the declaration does not shew any damage naturally arising from the defendant's direction to the now plaintiff to put the name "*Ramsay*" on the bricks. [*Wightman J.* It appears that the natural consequence of the plaintiff's acting on that direction was to involve him in a Chancery suit. Moreover, after notice from *Ramsay*, the plaintiff could not sell the bricks any longer. *Crompton J.* Whatever difficulty there may be in assessing the amount of the damage, it is clear that the declaration sufficiently discloses damage sustained by the plaintiff in consequence of the deception practised upon him by the defendant.] The plaintiff has his remedy against the defendant, upon the contract, as to all bricks manufactured for him, *Ramsay's* notice notwithstanding. [*Hill J.* Are you well founded in saying that a Court of equity will not grant an injunction to restrain the use of another person's trade mark, although it be innocent?]

(a) 4 M. & G. 357.

(b) 3 B. & C. 541.

(c) 5 C. B. 109.

In *Drewry on The Law and Practice of Injunctions*, Supplement, Part II, c. iv., p. 53, the principle upon which injunctions are granted to restrain the imitation of trade marks long exclusively used by a particular trader, so as to connect his name or trading concern with the reputation acquired in the market by the goods bearing the particular mark, is said to be expressed by Lord Langdale M. R. in *Perry v. Truefitt* (a); and a passage from his Lordship's judgment is cited, in which he says, "I own it does not seem to me that a man can acquire a property merely in a name or mark; but, whether he has or has not a property in the name or the mark, I have no doubt that another has not the right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using the particular name or mark." [Hill J. Does Mr. *Drewry* refer to *Millington v. Fox* (b), in which Lord Chancellor Cottenham granted the injunction prayed for, and said: "It does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names; and therefore" "the case is so made out as to entitle the plaintiffs to have the injunction made perpetual."?] Yes. At p. 55, Mr. *Drewry* says, "It will be observed, that," "in *Perry v. Truefitt* (a)," "Lord Langdale took occasion pointedly to advert to the doctrine of *Millington v. Fox* (b), and to express his opinion, that an exclusive right of property cannot be

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(a) 6 *Beav.* 66. 73.(b) 3 *Myl. & Cr.* 338. 352.

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acquired in a name or mark." Mr. *Drewry* then cites as follows, from Lord *Langdale's* judgment (a): "The case of *Millington v. Fox* (b) seems to have gone this length, that the deception need not be intentional, and that a man, though not intending any injury to another, shall not be allowed to adopt the marks by which the goods of another are designated, if the effect of adopting them would be to prejudice the trade of such other person. I am not aware that any previous case carried the principle to that extent." Mr. *Drewry* adds: "The writer believes that there is not any case since *Perry v. Truefitt* (c) and *Day v. Croft* (d), carrying the principle so far as it was carried in *Millington v. Fox* (b)." [Hill J. Although, in *Perry v. Truefitt* (c), Lord *Langdale* refused the injunction, he by no means overruled *Millington v. Fox* (b). *Hindmarch*, contra, here referred to *Blofield v. Payne* (e).] In *Farina v. Silverlock* (f) Lord Chancellor *Cranworth* dissolved an injunction which *Wood* V.C. had granted (g) against the printing and sale by the defendant of labels similar to those in use by the plaintiff to designate a particular article as made by him; until the plaintiff, who alleged that the labels were used for a fraudulent purpose, should have established his case by an action at law. [Hill J. In that case it was shewn that, in very many instances, labels the same as or similar to those used by the plaintiff might be sold for a legitimate purpose; and there was no proof of actual fraud by the

(a) 6 *Beav.* 73.(b) 3 *Myl. & Cr.* 338.(c) 6 *Beav.* 66.(d) *Sic.*: but should be *Croft v. Day*, 7 *Beav.* 84.(e) 4 *B. & Ad.* 410.(f) 6 *De G. M. & G.* 214.(g) 1 *Kay & J.* 509.

defendant. The Lord Chancellor, moreover, differed from *Wood v. C.* rather as to the facts than as to the law.] The protection, in equity, of the right to the exclusive use of a trade mark, is of modern origin. In *Blanchard v. Hill* (a) the plaintiff moved for an injunction to restrain the defendant from using the Mogul stamp on his cards, suggesting the sole right to be in the plaintiff, he having appropriated the stamp to himself, conformably to the charter granted to *The Card Makers' Company* by King *Charles* the First. Lord *Hardwicke*, however, refused the injunction, and said that he knew no instance of restraining one trader from making use of the same mark with another. At the present day, when the jurisdiction of equity is admitted, there is no sufficient reason for saying that that Court will afford greater protection to the right to the exclusive use of a trade mark than can be obtained at law; or that it will hold an innocent counterfeiter responsible for the infringement of such a right. Lastly, the costs incurred by the now plaintiff, in the Chancery suit brought against him by *Ramsay*, are not, in any view of the case, recoverable as damages from the now defendant; *Malden v. Fyson* (b), *Broom v. Hall* (c), *Collins v. Cave* (d). [*Crompton J.* referred to *Collen v. Wright* (e).]

Hindmarch, contra, was not called upon.

(COCKBURN C. J. was absent; and *Wightman J.* left the Court before the close of the argument.)

(a) 2 Atk. 484.

(b) 11 Q. B. 292.

(c) 7 C. B. N. S. 503.

(d) 4 H. & N. 225.

(e) 7 E. & B. 301. Judgment affirmed in the Exchequer Chamber, 8 E. & B. 647.

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CROMPTON J. I am of opinion that our judgment must be for the plaintiff. *Millington v. Fox* (a), a case of the highest authority, shews that a Court of equity will grant a perpetual injunction against the use, by one tradesman, of the trade marks of another, although such marks have been so used in ignorance of their being any person's property, and under the belief that they were mere technical terms: the only doubt expressed by Lord *Cottenham* was as to the right of the plaintiffs in that case to costs. That decision, though it has been questioned in subsequent cases, has never been overruled; and is binding in this Court. Even in *Farina v. Silverlock* (b) Lord Chancellor *Cranworth* says, "Once arrive at the point that the use of this label is an infringement of the plaintiff's right, and I quite agree with what the Vice Chancellor has laid down, for this Court would stop anybody from selling an article which should enable the perpetration of that fraud, just as it would stop the use of the label itself." It would seem, therefore, that the mere fact of the sale by one person of an article marked with the trade mark of another is sufficient of itself, in equity, apart from the intention of the seller, to constitute fraud, and entitle the other to an injunction, on proof (which was wanting in *Farina v. Silverlock* (b)) that the sale is an infringement of the right of the other. Upon the remaining point, I am not prepared to say that, if the natural consequence of the defendant's acts has been to plunge the now plaintiff into a Chancery suit, the latter may not recover against the former, as damages in an action at law, the costs of that suit, whatever the result of it might have been.

HILL J. I am of the same opinion. The facts alleged

(a) 3 *Myl. & Cr.* 338.

(b) 6 *De G. M. & G.* 214, 222.

in the declaration, which must be taken to be true, are that the defendant, having employed the plaintiff to make bricks for him, knowingly directed the plaintiff to mark these bricks with the trade mark of another person; that the plaintiff, acting innocently and in ignorance of the rights of that person, complied with the direction; and that that person, *Ramsay*, thereupon filed a bill in Chancery for an injunction against the plaintiff, who compromised the suit at a heavy expense, to recover which, as damages from the defendant, he now brings this action. I am of opinion, upon these facts, that the plaintiff is entitled to recover. *Millington v. Fox* (a), which, however much it may have been questioned, has not been overruled, is a direct authority that the plaintiff was liable to the suit in equity; though he had counterfeited *Ramsay's* trade mark innocently. Moreover, the case of *Farina v. Silverlock* (b) appears rather to support than to contravene that decision. Lord Chancellor *Cranworth*, in that case, differed from *Wood V. C.* rather as to the facts than as to the law. He says (c), "I apprehend that the law is perfectly clear, that any one, who has adopted a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal (so to call it) his trade mark, and make purchasers believe that it is the manufacture to which the trade mark was originally applied." "What, however, appears to me to be really in dispute in this case is, the fact, whether or not it is true that there are a great number of persons who may legitimately purchase and do ordinarily legitimately

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1861. purchase the labels in question, because if there are, I confess that then I cannot concur in the decree which has been made by the Vice Chancellor. Once arrive at the point that the use of this label is an infringement of the plaintiff's right, and I quite agree with what the Vice Chancellor has laid down, for this Court would stop anybody from selling an article which should enable the perpetration of that fraud, just as it would stop the use of the label itself." The bill in that case stated that the defendant had printed and sold labels, being either copies of or only colourably differing from those which the plaintiff had invented and used for the purpose of distinguishing his *Eau de Cologne* from that of others; that thereby great quantities of spurious *Eau de Cologne*, made to resemble the plaintiff's, had been sold as the plaintiff's; and that thereby the plaintiff had been greatly injured. There was no allegation, however, that the defendant had fraudulently sold the labels; the observations, therefore, of the Lord Chancellor must be taken as an expression of his opinion that the defendant, though he had sold them innocently, would have been responsible if it had been proved that the sale was an infringement of the plaintiff's right. Upon this ground, therefore, our judgment must be for the now plaintiff. But I also agree with my Brother *Crompton*, that, if the natural consequence of the defendant's acts was (as it evidently was) to plunge the plaintiff into a Chancery suit, and thereby to incur costs and expenses, the plaintiff has a good cause of action against the defendant, to recover those costs and expenses as damages, whatever the result of the suit in question might have been.

Judgment for the plaintiff (a).

(a) See *Burgess v. Hills*, 26 Beav. 244. *Burgess v. Hately*, 26 Beav. 249.

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DAVIES, appellant, *against* The Right Honourable
 RICHARD, Baron BERWICK, respondent.

Wednesday,
 January 23rd.

CASE stated by justices of the county of *Salop*, under
 stat. 20 & 21 *Vict. c. 43*.

On 29th *August*, 1860, an information was laid by
Henry Burd, as agent for the respondent, charging that
 the appellant, on 17th *January*, 1859, contracted with
 the said *Henry Burd*, as such agent, to serve the respon-
 dent, in the capacity and employment of a servant in
 husbandry, for the term of one year from 1st *February*,
 1859, and so on from year to year, subject to a month's
 notice to determine such service at any time, at the
 wages of 1*l.* 5*s.* per week; and that the appellant,
 having entered on such service, and before the term of
 his contract was completed, was, on 23rd *August* last,
 guilty of misconduct in unlawfully refusing to obey the
 order of the respondent, viz., to go through the whole
 of the cattle stock under his charge (on a certain farm
 at *Cronkhill*, in the county of *Salop*, where the appel-
 lant was employed), so as to enable one

Stat. 4 G. 4.
 c. 34. s. 3.
 enacts "That
 if any servant
 in husbandry"
 "shall con-
 tract with any
 person" "to
 serve him"
 "for any time
 or times what-
 soever," "and"
 "having en-
 tered into such
 service shall"
 "be guilty of
 any" "miscon-
 duct or mis-
 demeanour in
 the execution"
 of his contract,
 he may be
 convicted by
 justices and
 sent to the
 House of Cor-
 rection, with
 hard labour.

Appellant
 was employed
 by respondent
 under a con-
 tract by the
 terms of which
 appellant was

Watkins

to keep the general accounts belonging to a farm of respondent, to weigh out food for
 cattle, to set the men to work, to lend a hand to anything if wanted, and in all things to
 carry out the orders of respondent. Appellant entered upon the employment, and, in
 the course of it, was ordered by respondent to go through the whole of the cattle stock
 under appellant's charge on the farm, and to give particulars of all the animals which
 had died under his care, and of all bullings and calvings which had taken place. Appel-
 lant, having refused to obey this order, was summoned before, and convicted by, justices,
 under the above enactment, for such refusal.

On appeal against this conviction, held that it was bad. First, because appellant was
 not a servant in husbandry; secondly, because, assuming that he was such a servant, he
 had not been guilty of any misconduct or misdemeanour in the execution of his contract
 to serve in that capacity.

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to identify and mark the animals; and to give also particulars of all that had died under his care, as well as the bullings and calvings, whether dead or alive.

On 1st *September*, 1860, the appellant appeared on summons to answer the said information before the justices. By the evidence of the said *Henry Burd*, who was then examined as a witness on behalf of the respondent, it was proved, amongst other things, that the terms of the said contract were that the appellant should keep the general accounts belonging to the farm at *Cronkhill*; should weigh out food for cattle, and set the men to work; should lend a hand to anything if wanted; and, especially, should in all things carry out the orders of the respondent. That, on 23rd *August*, 1860, the said *Henry Burd* conveyed an order written by the respondent and addressed to the appellant, in the terms set forth in the information; that he explained to the appellant the nature of the order, and handed him the paper; and that the appellant threw back the paper, stating that he would not give the information until something was cleared up, referring to a notice, which had appeared in the *Shrewsbury* papers, that the appellant was not authorized to receive moneys on behalf of the respondent. That the appellant admitted that he had the information required, partly in a book and partly in his head. That the appellant had not any book belonging to the respondent, nor was he engaged to keep a herd book; but that it was, in witness's opinion, part of the duty of a bailiff to do so.

The appellant was thereupon convicted by the justices under stat. 4 G. 4. c. 34. s. 3., and was adjudged to be committed to the House of Correction, with hard labour, for twenty-one days; and a proportionable part of his

wages (if any) during the time he should be so confined was ordered to be abated.

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The grounds of the conviction were, that the appellant was a servant in husbandry, and that the act of disobedience complained of was a misconduct or misdemeanour in the execution of his contract, within the meaning of stat. 4 G. 4. c. 34. s. 3.

The questions for the opinion of the Court were: First, whether the appellant was a servant in husbandry, within the meaning of the said statute: Secondly, whether the act of disobedience complained of was such a misconduct or misdemeanour in the execution of his contract as is contemplated by the said statute.

Bovill, for the respondent. The conviction was right. Stat. 4 G. 4. c. 34. s. 3. enacts "That if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person shall contract with any person or persons whomsoever, to serve him, her or them for any time or times whatsoever, or in any other manner, and" "having entered into such service shall" "be guilty of any" "misconduct or misdemeanour in the execution" of his contract, he shall be subject to conviction. Now, first, the appellant was a servant in husbandry, within the meaning of this enactment. His duties were not restricted to keeping the general accounts belonging to the respondent's farm, but it was his business, also, to weigh out food for cattle, set the men to work, attend to anything if wanted, and in all things carry out the respondent's orders. The expression "servant in husbandry," in the statute, does not refer merely to persons engaged in tilling and sowing land, or in other manual

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acts connected with the production of crops; but includes all servants employed upon a farm, who are, by the terms of their contract of service, bound to make themselves useful in its management. In *Lilley v. Elwin* (a) it was not disputed that the plaintiff, a waggoner, was amenable to the jurisdiction of justices under the statute, as a servant in husbandry. The statute has always received a liberal interpretation. Thus, in *Ex parte Ormrod* (b), *Williams J.* held that a person who had contracted to serve a firm of calico printers as a designer, for a term of years, was an "artificer" within the meaning of the Act. His Lordship, in giving judgment, said: "I cannot conceive that the word 'artificer' only applies to persons engaged in such occupations as require merely manual labour. The party who makes this application to the Court, himself states that he is a 'pattern designer,' a person in fact who makes the drawing of the pattern, which is then engraved on the printing rollers, and subsequently transferred in colours to the fabric itself. He is, therefore, the party who sets all in motion. He contributes in the most material degree to this branch of manufacture, the printing of calico, and may, therefore, I think, be properly included under the term 'artificer.'" In *Bowers v. Lovekin* (c) this Court put an equally wide construction on the same word "artificer," as used in The Truck Act, 1 & 2 W. 4. c. 37.; holding that butty colliers, who get the produce of a mine at so much a yard, and employ others under them to increase the quantity, are artificers, within the meaning of that Act, because they must work personally, and are treated as workmen. Secondly, the

(a) 11 Q. B. 742.

(b) 1 Dowd. & L. 825. 828.

(c) 6 E. & B. 584.

appellant was guilty of misconduct or misdemeanour in the execution of his contract, within the meaning of stat. 4 G. 4. c. 34. s. 3., by refusing to obey the order to go through the stock and give particulars of its increase or decrease while under his care. By the terms of his contract he was to lend a hand to anything, if wanted, on the farm, which was a breeding farm; and it was most essential to the respondent's interests that an account should be taken of the stock upon it, from time to time.

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Huddleston, contra. First, the appellant was not a servant in husbandry within the statute. In *Lilley v. Elwin* (a) the plaintiff, though he was engaged as a waggoner, during the harvest worked in the harvest field generally; and the Court thought that it was to be taken as part of his contract that he should do so. He was clearly, therefore, a servant in husbandry, and was properly taken before a magistrate for refusing to continue to work in the harvest field during the usual hours. But the appellant in the present case was not engaged as a servant at all; still less as a servant in husbandry. [*Crompton J.* His chief duty was to keep the general accounts belonging to the farm. From that, it should seem that his position was rather that of a steward than of a servant.] No doubt. All his other duties were ancillary to that of keeping the accounts. As to the stipulation that he was to lend a hand to anything if wanted, it did not authorize the respondent to exact from him duties not ejusdem generis with those of his employment. He was neither a servant in husbandry, nor did he come under any of the other descriptions of persons mentioned in the statute; nor was he a person

(a) 11 Q. B. 742.

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ejusdem generis with any of them, and therefore he was not liable to conviction as coming under the description of an "other person;" *Kitchen v. Shaw* (a). Secondly, the order, for disobedience to which the appellant was convicted, was one which he was not bound to obey. The case finds that he had no book belonging to the respondent, and that he was not engaged to keep a herd book. (He was then stopped.)

(COCKBURN C. J. and WIGHTMAN J. were absent.)

CROMPTON J. I am of opinion that this conviction must be quashed. First, the Act of Parliament applies only to persons who are engaged to do some kind of manual labour. I do not think that the appellant was employed for any such purpose. He appears to have been engaged rather as a sort of bailiff or superintendent on the farm, than as a servant in husbandry. The fact that it was one of his duties to weigh out food for the cattle would not make him a servant, any more than another of his duties, namely, to set the men to work, would do so. And although he was, by the terms of the contract, to lend a helping hand, generally, it cannot be supposed that he was to assist in matters other than such as were connected with his principal work, which was, to keep the accounts. Assuming, however, that we held him to be a servant in husbandry, it is clear, secondly, that he did not misconduct himself in anything connected with husbandry work. The conviction is bad, therefore, on both grounds.

HILL J. I am of the same opinion on both points.

Conviction quashed.

(a) 6 A. & E. 729.

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The QUEEN, on the prosecution of The Church-wardens and Overseers of the Poor of the Parish of MANGOTSFIELD, in the county of GLOUCESTER, respondents, *against* The Church-wardens and Overseers of the Poor of the Parish of TIVERTON, in the county of DEVON, appellants.

Wednesday,
January 23rd.

CASE stated by consent, and by Judge's order, under stat. 12 & 13 Vict. c. 45. s. 11., for the opinion of this Court, upon an appeal to the Gloucestershire Quarter Sessions for Michaelmas, 1860, against an order of two justices, adjudicating the settlement of Benjamin Holmes Worth, a pauper lunatic, to be in the parish of Tiverton, in the county of Devon, and also ordering the payment by that parish of certain moneys expended in and about his maintenance, &c., and of the expense of his future maintenance.

By the practice of a Wesleyan congregation, certain of its members were appointed stewards for a given circuit, and were called circuit stewards. One of their duties was to take and furnish houses for their ministers officiating within the circuit. The

rents of such houses were sometimes paid by the circuit stewards, and sometimes by the ministers; if by the ministers, the stewards repaid them the amount, together with the amount of the rates and taxes in respect of the houses, which were paid by the ministers in the first instance. It was the custom of the congregation to appoint a minister to officiate in a given place for one year certain, during which he could not be removed; and no minister officiated for more than three years in the same place.

At Michaelmas, 1832, the circuit stewards took and furnished a house at C., a place in the circuit, for a year certain, at the rent of 20*l.*, as a residence for W., who was then appointed to be minister at C. W. immediately took possession and occupied the house, as minister, till Michaelmas, 1835. During the three years of his occupation, W. paid the annual rent of 20*l.* for the house to the landlord: he was also in each of those years assessed to and paid the poor-rates for C. Both rent and poor-rates, however, were repaid to him by the circuit stewards.

Held, that W. did not gain a settlement in C. by renting a tenement, or by assessment to and payment of rates and taxes, under stats. 6 G. 4. c. 57. s. 2.; 1 W. 4. c. 18. s. 1.; and 4 & 5 W. 4. c. 76. s. 66.

1861. The said pauper lunatic was the legitimate son of

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TIVERTON. *William Worth*, a Wesleyan minister, and of *Susan Worth*. The said *William Worth* was born in the parish of *Tiverton*, in or about the month of *January*, 1781. The respondents alleged that the pauper lunatic had no other settlement than this the birth settlement of his father; while the appellants relied on a subsequent settlement gained by the father in the parish of *Carisbrook*, in the *Isle of Wight*. From the year 1832 to the year 1835, both inclusive, the said *William Worth* was a Wesleyan minister, and the practice of the Wesleyan congregation, of which he was a minister, during that period, was as follows. Certain members of the congregation were appointed stewards for a circuit comprised within a given distance, and were called circuit stewards; and one of the duties of such circuit stewards was to take houses within their circuit as residences for their ministers officiating within such circuit; and to furnish such houses with furniture fit and proper for such residences. Sometimes the circuit stewards paid the rents of such houses, and sometimes the ministers, but in the latter case the amount of the rent so paid by the ministers was repaid to them by the circuit stewards; in like manner the amount of the rates and taxes paid by the minister in respect of such house was repaid to the said minister by the said circuit stewards. In the year 1832, the circuit stewards of the circuit within which the parish of *Carisbrook*, in the county of *Southampton*, in the *Isle of Wight*, was situate, in conformity with the aforesaid practice, bonâ fide took and rented a tenement situated in the said parish of *Carisbrook*, such tenement consisting of a separate and distinct dwelling-house and garden, as a residence for their minister officiating in

that part of the said circuit; and furnished the said dwelling-house with furniture fit and proper for such residence. And the said circuit stewards bonâ fide took and rented the said tenement, so situate in the said parish of *Carisbrook*, such tenement consisting of a separate and distinct dwelling-house and garden, for the term of one whole year from 29th *September*, 1832, at and for the rent of 20*l.* a year, that being also the yearly value of the said tenement, as a residence for their minister officiating in that part of the said circuit; and on the said 29th *September*, 1832, the said tenement having been so as aforesaid taken and rented by the said stewards, the said *William Worth*, having been appointed to officiate as such minister in that part of the said circuit, and continuing to be such minister from that time until and upon 29th *September*, 1835, with the consent of the said circuit stewards, as such minister, came to reside in and occupy, and as such minister resided in and occupied, the said tenement, the said dwelling-house being so furnished as aforesaid, under the said yearly taking for the term of one whole year (that is to say), upon and from the said 29th *September*, 1832, until and upon the 29th *September*, 1833, and so on afterwards on the same terms, from the said 29th *September*, 1833, until and upon the 29th *September*, 1835. The said *William Worth* actually paid the said rent of 20*l.* for the said tenement, to the landlord thereof, for each of the said years during which he so resided in and occupied the said tenement, but the amount of such rent was afterwards repaid to him by the said circuit stewards.

The said *William Worth*, in and during each of the said years in which he so resided in and occupied the said tenement, was assessed to the poor-rates for the

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said parish of *Carisbrook* in respect of the said tenement, and paid such rates, and resided in and occupied such tenement for forty days and upwards, in each of the said years, after payment of the said rates. The amount so paid by him for the said rates was repaid to him by the said circuit stewards in conformity with the practice aforesaid. The said *William Worth* was appointed to officiate as minister at *Carisbrook*, in conformity with the custom of the Wesleyans, which custom is to appoint their ministers to officiate in a given place for one year certain. The appointment is absolute. During the year a minister cannot be removed from the place of his appointment. It is also the custom that no minister shall officiate longer than three years in any one place.

The questions for the opinion of the Court were. First, did the pauper lunatic's father, *William Worth*, acquire a settlement in the said parish of *Carisbrook*, by renting the said tenement under the circumstances set forth? Secondly, did he acquire a settlement in the said parish of *Carisbrook*, by being assessed to and paying the poor-rates for the said parish, under the circumstances set forth?

If the decision of the Court should be in the affirmative on either of these questions, judgment was to be entered for the appellants, that the said order of the said justices be quashed at the Quarter Sessions for the county of *Gloucester* next or next but one after such decision was given. If the decision of the Court should be in the negative on both of these questions, judgment in like manner was to be entered for the respondents, that the said order be affirmed: with such costs, in either event, as this Court should adjudge.

Sawyer, for the respondents. Both questions must be answered in the negative. First, the pauper lunatic's father did not acquire a settlement in *Carisbrook* by renting a tenement. The acquisition of such a settlement is regulated by stats. 6 *G.* 4. *c.* 57. and 1 *W.* 4. *c.* 18. By stat. 6 *G.* 4. *c.* 57. *s.* 2. it is enacted, "That no person shall acquire a settlement in any parish" "maintaining its own poor, by or by reason of settling upon, renting or paying parochial taxes for any tenement, not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or building" "bonâ fide rented by such person, in such parish," "at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house or building" "shall be occupied under such yearly hiring, and the rent for the same, to the amount of ten pounds, actually paid, for the term of one whole year at the least." Stat. 1 *W.* 4. *c.* 18., which was passed to explain an ambiguity in the former Act, enacts, by sect. 1, that, thereafter, the settlement shall not be acquired, unless the house or building "shall be actually occupied under such yearly hiring" "by the person hiring the same, for the term of one whole year at the least, and unless the rent for the same, to the amount of 10*l.* at the least, shall be paid by the person hiring the same." In the present case, the pauper's father, though he actually occupied the house in *Carisbrook*, was not the person who hired it, it having been hired by the circuit stewards. The same objection applies to his payment of the rent; if, indeed, he can be said to have paid it, having been repaid the amount by the stewards. The relation of landlord and

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1861. tenant never existed between him and the owner of the house. Secondly, the pauper's father acquired no settlement by being assessed to and paying the poor rates in *Carisbrook*. By stat. 6 G. 4. c. 57. s. 2. no person is to acquire a settlement by "paying parochial taxes for any tenement," unless the other requirements of the section are also complied with. Stat. 4 & 5 W. 4. c. 76. s. 66., which enacts that from the time of the passing of that Act "no settlement shall be acquired or completed by occupying a tenement, unless the person occupying the same shall have been assessed to the poor-rate, and shall have paid the same, in respect of such tenement, for one year," leaves the former law, as to what is necessary to constitute an occupation, unaltered; merely specifying the poor-rate as that parochial tax, assessment to and payment of which is to be a sine qua non to the acquisition of the settlement, however complete in other respects. (He was then stopped.)

Kingdon, for the appellants. Sufficient facts are stated in the case to enable the Court to draw the conclusion that the pauper's father was the tenant of the premises at *Carisbrook*, which he occupied for three years, during all which time he paid the rent and the poor-rates for them. He entered into possession for the term of one whole year; for the case finds that his appointment as minister at *Carisbrook* was absolute for a year certain. [*Crompton J.* It is the custom to appoint the minister for a year; but there was no obligation on the circuit stewards to keep Mr. *Worth* in the same house for that period.]

Per CURIAM (a). There must be judgment for the respondents. The pauper's father did not rent or hire the house at *Carisbrook*. He was very much in the position of a servant to the circuit stewards; who put him into the house taken by them, from which they could have removed him at their pleasure.

Judgment for the respondents.

(a) *Crompton and Hill Js.*

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The QUEEN against The Recorder of LEEDS.

Thursday,
January 24th.

SHAW, in last *Michaelmas* Term, obtained a rule, calling on the Recorder of *Leeds* to shew cause why a certiorari should not issue to bring up an order, made by him, for the payment by the overseers of the township of *Applethwaite*, in the county of *Westmoreland*, to the overseers of the township of *Leeds*, in the borough of *Leeds*, in the West Riding of the county of *York*, of the costs incurred by the latter as respondents in an appeal against an order of removal of a pauper from the said parish of *Leeds* to the said parish of *Applethwaite*.

Overseers of a parish, on which an order of removal of a pauper had been made by two borough justices, gave notice of an appeal against the order to the next Quarter Sessions for the county in which the borough was situate. The borough had a separate Court of

Quarter Sessions, which alone had jurisdiction to hear the appeal. The day before the Borough Sessions next after the notice of appeal were held, the appellants gave notice to the respondents that, finding that the Sessions for the county had no jurisdiction, they abandoned the appeal. The appellants did not appear, and the respondents did, at the Borough Sessions; which Court, on the application of the respondents, dismissed the appeal, and made an order for the payment by the appellants to the respondents of the costs incurred by the latter in the appeal.

Held, discharging a rule for a certiorari to bring up this order, that the order was rightly made. That the Borough Sessions would have had jurisdiction to hear the appeal, if persisted in; the erroneous statement in the notice of appeal that the appeal would be made to the County Sessions being merely surplusage: and that, upon the abandonment of the appeal, the Borough Sessions had jurisdiction under stat. 12 & 13 *Vict. c. 45. s. 6.* to make the order.

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The following facts appeared from the affidavits. The order of removal, having been made on 27th *June*, 1860, by two justices acting in and for the borough of *Leeds*, was served on the appellants on 4th *July*, 1860, together with the grounds of removal. On 19th *July*, notice of appeal was served on the respondents by the appellants, stating that they "intended at the next general Quarter Sessions of the Peace to be holden in and for the West Riding of the county of *York*, at *Leeds*, in the said county, to appeal against the said order." On 27th *August*, a similar notice, accompanied with grounds of appeal, was also served. On 6th *October*, the respondents' attorney wrote to the appellants' attorney, giving notice that, on the hearing of the appeal, the Court would be moved to amend one of the grounds of settlement. On 8th *October*, the appellants' attorney wrote the following letter, which was received by the respondents' attorney on the 9th.

"Sir, "*Kent Street, Kendal, October 8th, 1860.*

"The overseers of the poor of *Applethwaite*, in the township of *Windermere*, in the county of *Westmoreland*, have received a notice that the respondents intend to move the Court to amend the fifth ground of settlement; and, if the appeal proceeds, the service of such notice will be admitted. It is necessary, however, that I should state to you that the notice of appeal has been given to the next General Quarter Sessions of the Peace, to be holden in and for the West Riding of the county of *York*, at *Leeds*, in the said county; since the service of which notice it has occurred to me that, *Leeds* having a separate Court of Quarter Sessions as a borough, the appeal ought to have been tried there, and cannot, without your consent, be tried at the Quarter Sessions for the

county. I have therefore to ask you if you will consent to waive this objection, and permit the appeal to be tried pursuant to the notice of appeal which we have given. If not, the Sessions for the county having no jurisdiction, you will consider this a notice that the appeal is abandoned. In case the appeal proceeds, I shall, of course, admit the service of the order and grounds of removal, you admitting the service of notice and grounds of appeal; and I am prepared also to abandon some of the grounds of appeal stated. An immediate answer will oblige

"Yours obediently,

"*Richard Wilson.*"

"*Ch. Naylor, Esq., Solicitor, Leeds.*"

To which the respondents' attorney replied as follows:

"Sir,

"*Leeds, October 9th, 1860.*

"I cannot advise my clients to consent to this appeal being tried by the Court of Quarter Sessions for the West Riding of the county of *York*. I shall, therefore, on behalf of the respondents, accept your letter of yesterday, received this morning, as a notice of abandonment of your appeal, as requested by you. Yours, &c.

"*Charles Naylor.*"

The *Leeds* Borough Sessions were held on 10th *October*, and, the appellants not appearing, the respondents moved by counsel that the appeal be dismissed with costs. Thereupon the Recorder made the order in question, which, after reciting the order of removal and the notice of appeal in the terms above set out; that the appellants had subsequently abandoned the appeal; and that satisfactory proof of the above had been adduced at the General Quarter Sessions holden at *Leeds*, in and for the said borough (being the Court of General Quarter Sessions to which the appeal, if it had been

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proceeded with, ought to have been brought, and which Court alone had jurisdiction over the same); proceeded to order the costs in law incurred by the respondents in the said appeal, to be paid to them by the appellants. Notice was sent on 10th *October* by the respondents, and received by the attorney of the appellants on the 11th, that the appeal had been dismissed with costs, and that the taxation would take place on *Friday* the 12th. The trial of appeals had been postponed by the Recorder to that day, but no application was made during the Sessions on behalf of the appellants.

The Quarter Sessions for the West Riding were held at *Leeds* on 15th *October*. It was sworn by the appellants' attorney that they never had any intention to try at the Borough Sessions; and by the respondents' attorney, that they were prepared to have tried at the Borough Sessions, knowing that those Sessions alone had jurisdiction.

J. B. Maule now shewed cause. The Recorder had jurisdiction to make the order. Notwithstanding that the appellants gave notice of appeal to the County Sessions they could have compelled the Recorder to hear it; the only proper tribunal being the Borough Sessions, and the erroneous statement in the notice, that the appeal would be made to the County Sessions, being merely surplusage, not invalidating the notice; *Regina v. Recorder of Liverpool* (a), *Regina v. Justices of Buckinghamshire* (b). The respondents, therefore, were bound to act upon the notice of appeal by preparing to meet the appellants before the Recorder. And the Recorder, upon proof of

(a) 15 Q. B. 1070.

(b) 4 E. & B. 259, note.

the notice of appeal, and upon the non-appearance of the appellants to prosecute the appeal, was authorized to make the order for the payment of costs by the appellants to the respondents, by stat. 12 & 13 Vict. c. 45. s. 6., which enacts, "That any Court of General or Quarter Sessions of the peace, upon proof of notice of any appeal to the same Court having been given to the party or parties entitled to receive the same, though such appeal was not afterwards prosecuted or entered, may, if it so think fit, at the same Sessions for which such notice was given, order to the party or parties receiving the same such costs and charges as by the said Court shall be thought reasonable and just to be paid by the party or parties giving such notice." That enactment confers upon all Courts of Quarter Sessions the same power, in this respect, which was given by stat. 8 & 9 W. 3. c. 30. s. 3. to Courts of Quarter Sessions for counties or ridings.

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Shaw, in support of the rule. The Recorder had not jurisdiction to make the order, under stat. 12 & 13 Vict. c. 45. s. 6.; notice of appeal to his Court not having been given, but to the County Quarter Sessions. The appellants not only did not give notice of appeal to the Borough Sessions, but they never had any intention to try the appeal there. [*Crompton J.* How can the intention in the mind of the parties giving the notice have any effect upon the validity or invalidity of the notice itself?] In *Regina v. Justices of Salop* (a) it was held that a notice of appeal to Borough Sessions could not be treated as a notice of appeal to the County

(a) 4 E. & B. 257.

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Sessions, in a case where the appeal lay to the latter only, after the appellants had acted on the notice by appearing at the Borough Sessions and endeavouring to have the appeal heard there. And the Court distinguished *Regina v. Recorder of Liverpool* (a) on the ground that the appellants, there, had not acted on their erroneous notice. In the present case, the appellants, throughout, acted on their notice as a notice of appeal to the County Sessions; the only difference between their proceedings and those of the appellants in *Regina v. Justices of Salop* (b) being, that they did not go so far as to run up unnecessary costs by attending at the County Sessions, but abandoned the appeal the day before those Sessions. [Hill J. That is a material distinction between the two cases. In *Regina v. Justices of Salop* (b) the notice of appeal had performed its office, when the appellants appeared at the Sessions for which it was given; but the present appellants did not thus act upon the notice which they had given.] The respondents ought to have applied to the County Sessions for their costs: according to the dictum of *Erle J.* in *Regina v. Justices of Salop* (c), who there says, "The Borough Sessions" (the wrong Sessions to try the appeal, but the Sessions notice of appeal to which had been given) "had so far jurisdiction in consequence of the mistaken notice, that they might have given the respondents costs."

(COCKBURN C. J. and WIGHTMAN J. were absent.)

CROMPTON J. I am of opinion that this rule must

(a) 15 Q. B. 1070.

(b) 4 E. & B. 257.

(c) 4 E. & B. 262.

be discharged. After the decision in *Regina v. Recorder of Liverpool (a)*, the respondents, on the receipt of the notice of appeal, were entitled to suppose that, notwithstanding the mistake in it, they would be called before the right tribunal, namely, the *Leeds* Borough Sessions. The Recorder of *Leeds* had jurisdiction over the appeal, and it is clear that, upon the abandonment of the appeal, he had jurisdiction to make an order, giving the respondents their costs. I cannot see how we can say that the Recorder was wrong, unless we overrule *Regina v. Recorder of Liverpool (a)*. No doubt, if Mr. *Wilson's* letter to Mr. *Naylor*, of 8th October, 1860, had been written earlier, it would have prevented the respondents from incurring costs in preparing to resist the appeal: but the delay does not prevent the costs so incurred, up to the time of the receipt of the letter, from being costs to which the respondents were entitled. Inasmuch, however, as that letter ought to have been written more promptly, I think that the rule should be discharged without costs.

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HILL J. I am of the same opinion. We could not make this rule absolute, unless we held that the Recorder had no jurisdiction over the appeal; to do which would be to overrule *Regina v. Recorder of Liverpool (a)*. The appellants gave a notice of appeal which they might have acted upon as a good notice of appeal to the *Leeds* Borough Sessions; and the notice of abandonment of the appeal gave the Recorder jurisdiction to give the respondents their costs. I think, however, that the rule should be discharged, without costs, on two grounds:

(a) 15 Q. B. 1070.

1861. first, because the conduct of the respondents' attorney was disingenuous: secondly, because the affidavit which he has filed, on shewing cause, is very improperly prepared, contains mere repetitions of what had already been sworn to, and must have been so framed with a view, not to informing the Court, but to increasing the costs.

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Rule discharged, without costs.

Friday,
January 25th

DUTTON *against* POWLES.

[Reported, in the Queen's Bench, and in the Exchequer Chamber on error from that Court, 2 *B. & S.* 174.]

Saturday,
January 26th.

The QUEEN, on the prosecution of HENRY BURTON, respondent, *against* ISAAC AULTON, appellant.

Earthenware
jugs or drink-
ing cups, or-
dinarly used
as imperial
measures by
a publican in
his business,
are, although
not stamped

as measures, and exempted by stat. 5 & 6 *W. 4. c. 63. s. 21.* from being so stamped, nevertheless "measures" within the meaning of sect. 28 of that Act, which empowers any authorized inspector of weights and measures to enter any shop or place within his jurisdiction, in which goods are exposed and kept for sale, and there to examine all measures, and to compare and try them with the copies of the imperial standard measures required by the Act to be provided: and renders measures, found on such examination to be unjust, liable to be seized and forfeited; and the person in whose possession they are found to be convicted in a penalty.

ON an appeal to the *Worcestershire* Quarter Sessions by *Isaac Aulton*, against a conviction of him by two justices under stat. 5 & 6 *W. 4. c. 63.*, the Sessions affirmed the conviction, subject to the opinion of this Court on the following case.

The appellant, before and at the time of the seizure hereinafter mentioned, was a licensed victualler and retailer of beer in *Dudley*, in the county of *Worcester*, and sold beer to customers out of the house, and to customers to drink in the house, the beer in the latter case being supplied sometimes outside the bar, sometimes within the bar, and sometimes in the parlour.

The respondent, *Henry Burton*, is the inspector of weights and measures for the district of *Dudley*. On 23rd *August*, 1859, he entered the appellant's house for the purpose of examining the appellant's measures. He there found the appellant's wife, and told her that he was come to inspect her measures. She thereupon produced a number of measures, which he examined and found to be correct. On a shelf in the bar, on the left-hand side, apart from those measures, were nine earthenware cups. The inspector said to appellant's wife "I must try those also." She said, "They are cups, and we only use them for the parlour; you'll not find them measure." The inspector, however, insisted upon trying them, and the cups were handed to him. He tested them with a measure, found by the Sessions to be a copy of the imperial pint measure, and found them to contain three quarters of a quatern less than the said measure. These cups were without stamp or mark. The same price was charged for the beer sold in them as in the stamped pint measures, but some of the witnesses stated that when beer was supplied to them in those cups they did not suppose that they were receiving a full pint; whilst other witnesses said that when they were served with beer in those cups they meant to have and thought they were getting a pint of beer, for which they paid the usual full price. The inspector seized the said cups

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as being unjust measures, and caused an information to be laid against the appellant to recover the penalties alleged to have become payable by reason of his having unjust measures in his possession.

The case came on for hearing before the justices on 5th *September* then following, when the appellant was convicted and adjudged to pay the penalty of 9s. and costs. The conviction purported to be "for that the said *Isaac Aulton*, on 23rd *August*, 1859, at the parish of *Dudley*, in the county of *Worcester*, unlawfully had in his possession, in a certain shop there, being the shop of the said *Isaac Aulton*, wherein goods were then kept for sale by measure, nine measures, purporting respectively to be pint measures; all which said measures, so purporting respectively to be pint measures, were, upon examination thereof duly made on the day and year aforesaid, according to the statute in that behalf, in the said shop, by *Henry Burton*, an inspector of weights and measures duly appointed in that behalf for the district wherein the said shop is situate, and having jurisdiction in the premises, and being duly authorized in writing for that purpose, under the hand of" a justice of the peace for *Worcestershire*, "found to be unjust, contrary to stat. 5 & 6 *W. 4. c. 63.*" The conviction concluded, "And we do adjudge that the said *Isaac Aulton* has forfeited for his said offence the sum of 9s."

At the Quarter Sessions it was contended for the appellant, on grounds of appeal which raised the objections, First. That the conviction was bad for not stating an adjudication as to the costs, and mode of enforcing payment thereof.

Secondly. That unstamped earthenware jugs, or drinking cups, ordinarily used as measures, are not

"measures" within the meaning of the 28th section of stat. 5 & 6 *W.* 4. c. 63.

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The Court of Quarter Sessions overruled these objections, and found that the cups in question had been ordinarily used by the appellant as pint measures, but not otherwise represented to be pint measures.

If the Court of Queen's Bench should be of opinion that either objection ought to prevail, the conviction was to be quashed: otherwise the judgment of the Sessions was to be affirmed, with such further costs as the Court might direct.

Welsby, for the respondent, in support of the conviction. (*D. D. Keane*, contra, abandoned the first ground of appeal.) The earthenware cups in question were "measures" within the meaning of stat. 5 & 6 *W.* 4. c. 63. s. 28., under which the appellant was convicted. Sect. 6 of that Act abolishes all local or customary measures, and subjects to a penalty every person who shall sell by any denomination of measures other than one of the imperial measures, or some multiple or aliquot part thereof: with a proviso "that nothing" therein "contained shall prevent the sale of articles in any vessel, where such vessel is not represented as containing any amount of imperial measure, or of any fixed, local, or customary measure heretofore in use." Sect. 12 enacts that all measures of capacity which shall be made after the passing of the Act shall have their contents denominated, stamped, or marked on the outside, in legible figures and letters. Sect. 21 exempts from being stamped "any glass or earthenware jug or drinking cup, though represented as containing the amount of any imperial measure, or of any multiple thereof." Then

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sect. 28 empowers any authorized inspector of weights and measures "to enter any shop, store, warehouse, stall, yard, or place whatsoever within his jurisdiction, wherein goods shall be exposed or kept for sale," "and there to examine all weights, measures," &c., "and to compare and try the same with the copies of the imperial standard weights and measures required or authorized to be provided under" the "Act; and if upon such examination it shall appear that the said weights or measures are light or otherwise unjust, the same shall be liable to be seized and forfeited; and the person or persons in whose possession the same shall be found shall, on conviction, forfeit a sum not exceeding 5*l*." In the present case, the Sessions have found as a fact that the cups in question had been ordinarily used by the appellant as pint measures. Although, therefore, they were made of earthenware, and as such did not, by reason of sect. 21, require to be stamped, their ordinary use, as pint measures, by the appellant, amounted to a representation, within the meaning of sect. 6, that they contained imperial pints; or, in other words, that they were "measures" within the meaning of sect. 28. *Washington v. Young* (a) is directly in point to shew that the ordinary use of earthenware vessels as measures constitutes them measures subject to the operation of the Act. (He was then stopped.)

D. D. Keane, contra. The conviction states that the appellant was convicted for unlawfully having in his possession, in his shop, "nine measures, purporting respectively to be pint measures," but not being such.

(a) 5 *Exch.* 403.

But inasmuch as the cups, being earthenware, were, in accordance with sect. 21 of the Act, left unstamped, they could not purport to be measures, and a conviction of the appellant under sect. 28 was wrong. Proceedings should have been taken against him for the use of earthen vessels untruly represented to contain imperial pints, and thus not within the protection of the proviso in sect. 6. [*Crompton J. Washington v. Young (a)* appears to be directly in point against you; and, as being the decision of a Court of co-ordinate jurisdiction, is binding upon us.] The Court will scarcely follow that decision if it does not concur in it, in a case where, as in the present, there is no appeal. Either that decision was erroneous, or it is distinguishable from the present case. Sect. 28 of the Act applies to such measures only as bear a denomination of their capacity upon the face of them, and so purport to be measures.

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(COCKBURN C. J. was absent, and WIGHTMAN J. left the Court before the conclusion of the argument.)

CROMPTON J. We should be bound by *Washington v. Young (a)* even if we did not agree with it: I, however, entirely concur with the Court of Exchequer in that decision.

HILL J. We are clearly bound by *Washington v. Young (a)*, which moreover is, in my opinion, good law. If an earthenware vessel, although not stamped as a measure, is ordinarily used as containing a certain

(a) 5 *Exch.* 403.

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 The QUEEN the inspector to be unjust, as not containing that
 V. amount, it is liable to be seized and forfeited, and the
 AULTON. person using it is liable to a penalty, under sect. 28 of
 the Act of Parliament.

Conviction affirmed, with costs.

Saturday, The Overseers of EAST DEAN, appellants, *against*
January 26th. JOHN EVERETT, respondent.

Stat. 43 *Elis.*
c. 2. s. 4.
 empowers
 "as well"
 "the present
 as subsequent"
 "overseers,
 or any of
 them," by
 warrant from
 two justices,
 to levy all
 arrears due
 for poor-rate,
 by distress and
 sale of the
 offender's
 goods. Stat.
 17 *G. 2. c. 38.*
s. 11. enacts
 that, in case
 any person
 shall refuse
 or neglect to
 pay the over-
 seers by whom
 a poor-rate is
 made, any sum at which he is legally rated, "the succeeding overseers" may levy such
 arrears, and out of the money so levied reimburse their predecessors all sums of money
 expended by them for the use of the poor.

CASE stated, under stat. 20 & 21 *Vict. c. 43.*, by
 justices in Petty Sessions for the *Newnham* division
 of the county of *Gloucester*.

The respondent was summoned by the appellants, the
 overseers of the township of *East Dean*, in the said
 county, for non-payment of two poor-rates for that
 township, made on 1st *January*, 1858, and 16th *June*,
 1858, respectively.

The overseers who made the said rates continued in
 office until 25th *March*, 1859, at which time other per-
 sons were appointed, who remained in office until 25th
March, 1860, when the appellants were appointed.

The respondent appeared in accordance with the sum-
 mons, and the justices, upon the hearing, decided that

Held, that the latter statute does not restrict the power conferred by the former to
 overseers immediately succeeding those by whom a poor-rate is made, but that any
 overseers, subsequent to those making the rate, are still entitled to procure a distress
 warrant from justices to enforce payment of arrears of the rate by defaulters.

the appellants could not recover the said rates, because they were of opinion that a poor rate cannot be recovered except by those who made it, or by those who may be the overseers in the year next after that in which it was made.

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The question for the opinion of the Court was, Whether, upon the facts stated in the case, the justices ought to have made an order for the payment of the said rates by the respondent, and to have granted a warrant of distress.

Hopwood, for the appellants, in support of the complaint. The justices came to a wrong decision. Stat. 17 G. 2. c. 38. s. 11. enacts, "That in case any person or persons shall refuse or neglect to pay to such overseers as aforesaid," that is, the overseers who make the rate, "any sum or sums of money that he, she, or they shall be legally rated or assessed to, it shall and may be lawful to and for the succeeding overseers, and they are hereby required to levy such arrears, and out of the money so levied to reimburse their predecessors all sums of money which they have expended for the use of the poor." The justices appear to have decided the case with reference solely to this enactment, and to have interpreted the words "the succeeding overseers" as equivalent to "the overseers immediately succeeding." Whether or not, however, that is the proper construction, the original statute under which poor-rates were first imposed, 43 Eliz. c. 2., is still in full force, and by sect. 4 enacts "that it shall be lawful, as well for the present as subsequent churchwardens and overseers, or any of them, by warrant from any two" "justices,"

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“to levy” “all arrearages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender’s goods.” That enactment evidently applies to any subsequent overseers, not to those, only, who immediately succeed the overseers making the rate; whatever may be the proper construction of stat. 17 *G. 2. c. 38. s. 11.*, in which “succeeding” is used instead of “subsequent.” Had the Legislature, by the Act of *George 2*, intended to restrict the power conferred by the statute of *Elizabeth* to the immediately succeeding overseers, they would have done so by express words; as may be inferred from the language of stat. 11 & 12 *Vict. c. 91. s. 1.*, which enacts “That if the overseers of the poor in any parish shall lawfully, by virtue of their office, contract any debt on account of the parish within three months prior to the termination of their year of office, and the same shall not have been discharged by them before their year of office shall have determined, such debt shall be payable by and recoverable from their immediate successors in office, and chargeable upon the poor-rate of the said parish, in like manner as the same would have been payable and chargeable by such first mentioned overseers during their year of office.” (He was then stopped).

(No one appeared for the respondent.)

COCKBURN C. J. I am of opinion that the justices ought to have issued their warrant of distress to enforce these rates. But for the language of stat. 17 *G. 2. c. 38. s. 11.*, no doubt could have arisen on the subject. Under stat. 43 *Eliz. c. 2. s. 4.*, if a person rated to the

poor-rate does not pay his quota to the overseers who make the rate, he can be compelled by any subsequent overseers to pay. And stat. 17 *G. 2. c. 38. s. 11.* was not intended to abrogate the rights of any subsequent overseers ; but, rather, to relieve from liability outgoing overseers who had not collected all the rates accrued due during their year of office : enabling, as it does, the succeeding overseers to do it for them, and reimburse them out of the amount levied. Both common sense and justice require that a man should not be allowed, by delaying payment of a rate lawfully imposed upon him, to evade payment altogether. I am clearly of opinion that the appellants, being "subsequent overseers," are entitled, under the statute of *Elizabeth*, to enforce payment of arrears of poor-rate, though such rate was not made by their immediate predecessors. The case must go back to the justices with that expression of our opinion. Probably, at the hearing of the complaint, stat. 17 *G. 2. c. 38.*, only, was brought to their notice.

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(WIGHTMAN J. was absent.)

CROMPTON and HILL Js. concurred.

Case remitted to the justices.

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Thursday,
January 24th.
Saturday,
January 26th.

BATEMAN *against* FRESTON (a).

The examination of defendant, a bankrupt, commenced on 6th November, and was adjourned to 3rd December, 1860. On 29th November the bankruptcy Commissioner, at the instance of O., a creditor of defendant, who had proved his debt, issued a certificate, under The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. s. 257., Schedule B a., withdrawing protection from

GRAY moved, on behalf of the defendant, for a rule calling on the plaintiff to shew cause why the defendant should not be discharged from the custody of the keeper of the Queen's prison, as to the ca. sa. issued at the suit of the plaintiff.

It appeared that the defendant *Freston* was adjudicated a bankrupt by the *Bristol* District Court on 17th September, 1860, on which day, not being then in prison or in custody, he surrendered. On 2nd October, the first meeting was held, and assignees were chosen. At the second meeting, on 6th November, the examination of the bankrupt was commenced, and adjourned to 3rd December. On 29th November, the Commissioner issued a certificate under The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. s. 257., Schedule B a., withdrawing protection from the bankrupt, at the instance

defendant. O. sued out of the Court of Exchequer a ca. sa. upon this certificate, under which the sheriff arrested defendant on 1st December. In January, 1861, defendant being still in custody under that ca. sa., the Commissioner granted plaintiff, also a creditor, a similar certificate, under which a ca. sa. sued out of this Court, was in the same month lodged with the sheriff, as a detainer against defendant.

Held, discharging a rule calling on plaintiff to shew cause why defendant should not be discharged from custody as to this last ca. sa., that defendant was legally detained in custody under it. That, assuming that stat. 12 & 13 Vict. c. 106. s. 112. gives a bankrupt an absolute statutory protection from arrest till the day fixed for his final examination, so that the original arrest of defendant was illegal, the detainer lodged by plaintiff was nevertheless good, not having been lodged until after defendant's privilege from arrest had ceased. That the principle applicable to such cases is, that whenever an arrest by a detaining party would have been good, a detainer by him, being equivalent to an arrest, will be good also, unless it appears that the first arrest was a wrongful act of the sheriff himself, or that there was some collusion between the detaining party and the creditor making the arrest, or between the detaining party and the sheriff.

(a) See note (a) at the end of this case, post, p. 588.

of one *James Viner Ockford*, a creditor who had proved his debt; and the bankrupt was arrested by the sheriff of *Middlesex*, on 1st *December*, under a ca. sa. issued out of the Court of Exchequer at the suit of *Ockford*. On 4th *December*, another ca. sa. was delivered to the sheriff, which had issued out of the same Court on the same day, at the suit of another creditor, *Joseph Chapman*, upon another certificate of the Commissioner, given on 3rd *December*, after the termination of the adjourned meeting. On 15th *January*, 1861, another ca. sa. was lodged with the sheriff against *Freston* (who was still in custody), issued from this Court at the suit of the plaintiff, also a creditor, on another certificate of the Commissioner, granted a day or two previously.

Gray (having previously applied to *Martin B.* at Chambers, who referred him to the Court,) had obtained a rule in the Court of Exchequer, on the first day of this Term, to set aside the ca. sa. issued at the suit of *Ockford*, and to discharge *Freston* from the custody of the keeper of the Queen's prison, on the ground that the certificate and ca. sa. were granted and issued, and the arrest took place, when he was a bankrupt having privilege from arrest under The Bankrupt Law Consolidation Act, 1849; and also a rule to discharge him, as to the ca. sa. at the suit of *Chapman*, on the ground that it was lodged against him, and he was detained under it, while in such illegal custody: and that Court, on 18th *January*, made both rules absolute (*a*).

Gray, for his rule (*b*). As the Court of Exchequer have already decided in the similar case of the ca. sa. issued

(*a*) *Ockford v. Freston*, 6 H. & N. 466.

(*b*) *Monday, January 21st, Thursday, January 24th.*

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out of that Court at the suit of *Chapman*, the bankrupt is entitled to his discharge. The bankrupt's original arrest, on *Ockford's* ca. sa., was illegal, that writ having been founded on the certificate granted by the Commissioner on 29th *November*, and having been executed on 1st *December*, both which days preceded the day (3rd *December*) fixed for the bankrupt's final examination. The Bankrupt Law Consolidation Act, 1849, 12 & 13 *Vict. c. 106. s. 112.*, enacts, "That if the bankrupt be not in prison or custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the time by this Act limited for such surrender, and for such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed as the Court shall from time to time by indorsement upon the summons of such bankrupt think fit to appoint." This amounts to an absolute statutory protection of the bankrupt against arrest until the expiration of the time allowed him for finishing his examination, which time, in the present case, did not expire till 3rd *December*. *Ex parte Leigh (a)*, decided on the similar enactment then in force, 6 *G. 4. c. 16. s. 117.*, shews that the protection is conferred by the statute itself, and not by the Commissioner's endorsement on the summons. The Commissioner, therefore, had no power, on 29th *November*, to grant a certificate for *Freston's* arrest. Sect. 257, under which that certificate was granted, enacts "That" "every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be

(a) 1 *Glyn & J. 264.*

deemed a judgment creditor of such bankrupt to the extent of such proof; and the Court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of "any such creditor, grant a certificate under the seal of the Court, in the form contained in Schedule B a. to this Act annexed, and every such certificate shall have the effect of a judgment entered up in one of Her Majesty's superior Courts of common law at *Westminster* until the allowance of the certificate of conformity of such bankrupt; and the" "creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt." This section must be read with reference to sect. 112; and, when so read, clearly does not empower the Commissioner to grant a certificate until after the time during which the bankrupt is absolutely protected by sect. 112. The certificate of 29th *November* was therefore void, and the bankrupt's arrest under the ca. sa. founded upon it illegal. Indeed, that arrest was illegal, by reason of the bankrupt being then privileged by the statute from arrest, whether the Commissioner's certificate in question was a nullity or not. And, the original arrest being illegal, it follows that all subsequent detainers of the bankrupt, lodged with the sheriff while the bankrupt was thus illegally in custody, were illegal also, there being nothing to found a valid detainer upon; *Barratt v. Price* (a), *Barrack v. Newton* (b), *Hooper v. Lane* (c). [*Hill J.* The privilege from arrest of a

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(a) 9 *Bing.* 566.(b) 1 *Q. B.* 525.(c) 6 *H. L. Ca.* 443.

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witness or suitor in a case may render invalid subsequent detainers of him, if he is arrested; but there is possibly a distinction between the position of a person privileged on such a ground and that of a person whose privilege expires at a given fixed time. Here, the bankrupt's protection had expired before the detainer was lodged under which he is now held in custody.] A bankrupt illegally arrested is in all cases entitled to his discharge; *Ex parte Hawkins* (a), *Ex parte King* (b), *Ex parte Donlevy* (c), *Sidgier v. Birch* (d), *Ogle's Case* (e), *Ex parte Ross* (f). [Crompton J. Is there any authority which shews that a party, illegally arrested while privileged from arrest, cannot legally be detained in that arrest under a detainer lodged after the privilege has ceased?] In *Spence v. Stuart* (g) it was held that a witness, arrested while his privilege redeundo from giving evidence before an arbitrator continued, could not be kept in custody under a detainer afterwards lodged against him. [Hill J. If your argument is correct, a bankrupt who is once illegally arrested may, by lying in prison till all the subsequent detainers which he has reason to apprehend are lodged, and then claiming his discharge, evade them all.] If the original arrest is illegal, so are all subsequent detainers. In *Archbold's Bankruptcy Practice*, p. 374 (ed. 11, by *Flather*), it is laid down, generally, that "where a bankrupt is entitled to his discharge upon an arrest, he will be discharged also from all detainers lodged against him after it took place:" "and the discharge must be

(a) 4 *Ves.* 691.

(c) 7 *Ves.* 317.

(e) 1 *Ves.* 556.

(b) 7 *Ves.* 312.

(d) 9 *Ves.* 69.

(f) 11 *Ross.* 260.

(g) 3 *East.* 80.

unconditional." The law is similarly stated in *Chitty's Archbold's Practice*, vol. 1, p. 742 (ed. 10), and in *Montagu and Ayrton's Bankruptcy Practice*, vol. 1, p. 442. In all such cases, whether or not the sheriff is liable to an action for making the first arrest, the invalidity of that arrest avoids all subsequent detainers against the party arrested, at whatever time they may be lodged with the sheriff. The judgment of the Court of Exchequer in favour of the present defendant, in the case of *Chapman's ca. sa.*, which is on all fours with that now before the Court, is conclusive in the defendant's favour. With the exception of *Martin B.* (who, however, did not dissent,) none of the Judges in the other Court expressed any doubt as to the defendant's right to be discharged. [*Wightman J.* referred to *Ex parte Cogg (a)*, and *Hill J.* to *Eggington's Case (b)*.]

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J. D. Coleridge (c) shewed cause in the first instance. First, the original arrest of the defendant was legal. The true construction of stat. 12 & 13 Vict. c. 106. s. 112. is, not that it absolutely protects a bankrupt from arrest until his first examination is over, but that it confers a protection conditional upon its not being withdrawn by the Commissioner before that time.* The decisions on the construction of the repealed statutes, cited on the other side, do not affect the question. The language of those statutes was different. Stat. 5 G. 2. c. 30. s. 5. conferred upon bankrupts freedom from arrest, for and during the forty-two days next after written notice of the issuing of the commission of bank-

(a) 6 D. P. C. 461.

(b) 2 E. & B. 717.

(c) Thursday, January 24th.

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ruptcy, and for such further time as should be allowed them for finishing their examinations. Stat. 6 G. 4. c. 16. s. 117. was to the same effect; and sect. 118 enacted, that it should be lawful for the Commissioners, at any time appointed for the last examination of the bankrupt, or any enlargement or adjournment thereof, to adjourn such examination sine die; and that the bankrupt should be free from arrest or imprisonment for such further time, not exceeding three calendar months, as the Commissioners should by indorsement upon the summons appoint. These statutes, therefore, gave the bankrupt absolute protection for forty-two days, and left the Commissioners no discretion, during that period, to withdraw it. But stat. 12 & 13 Vict. c. 106. s. 112. enacts that the protection shall be "for such" "time as shall be allowed" the bankrupt "for finishing his examination, and for such time after finishing his examination until his certificate be allowed as the Court shall from time to time by indorsement upon the summons of such bankrupt think fit to appoint." The enactment that the indorsement may be made from "time to time" is new, and points to any time, and therefore to a time preceding, as well as following, the passing of his final examination by the bankrupt.

The case was then adjourned.

J. D. Coleridge was now about to proceed with his argument, when he was stopped by *WIGHTMAN J.*, who delivered the judgment of the Court (a) as follows.

In this case, the day fixed by adjournment for the last examination of the bankrupt was the 3rd of *December*.

(a) *Wightman, Crompton and Hill Js.*

On the 29th of *November*, the Commissioner had granted a certificate, under the 257th section of stat. 12 & 13 *Vict. c. 106.*, to a creditor, which, if valid, would have the effect of a judgment, and under which a *ca. sa.* was issued out of the Court of Exchequer; and the bankrupt was arrested under it on the 1st of *December*, two days before the day fixed for his last examination. The Court of Exchequer held that the certificate of the Commissioner was invalid, and set aside the *capias*, and discharged the bankrupt from the arrest under it; and they also discharged the bankrupt, as against another creditor, who had, whilst the bankrupt was in custody under the invalid certificate and *capias*, but after the adjourned meeting of the 3rd of *December*, obtained a valid certificate from the Commissioner, and had lodged a detainer against him upon a *capias* issued upon that valid certificate. The Court of Exchequer discharged him from that detainer, on the ground that, as the original arrest was illegal, all subsequent detainers, until he was discharged from custody under the first, were illegal also. The bankrupt was also detained in custody under a *capias* issued out of this Court by another creditor, who had, after the 3rd of *December*, obtained a certificate from the Commissioner; and the question before us is, whether the bankrupt is entitled to his discharge from that detainer.

In support of the bankrupt's claim to be discharged, it was said that, until the 3rd of *December*, the day fixed for his final examination, the 112th section of stat. 12 & 13 *Vict. c. 106.* gave him an absolute statutory protection from arrest, and that, having been arrested by a creditor before that day, he was entitled to his discharge, not only from that arrest, but from all de-

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tainers lodged against him while he was in custody under that illegal arrest. In support of this proposition several cases were cited, in which it had been held that, if the original arrest is illegal, subsequent detainers lodged whilst the prisoner is in custody under the illegal arrest are inoperative, and the prisoner is entitled to be discharged from them; and it was said that this was more especially the case where the discharge from the original arrest was by reason of some personal privilege of the defendant: as in the case of a witness arrested on his way to or from the Court where he is to be a witness, or of a bankrupt who by the Bankruptcy Act is declared to be free from arrest or imprisonment during the time or further time allowed him for finishing his examination. It is not necessary to examine each of the cases cited in detail, some of them in the time of Lord *Eldon*; for in several of them it does not appear clearly, from the facts stated, whether the detainers were not lodged during the existence of the privilege or protection, in which case they would be subject to the same objection as the first arrest. This, indeed, appears to have been the ground on which the case of *Spence v. Stuart* (a) was decided, and is consistent with the explanation of that case as given by the Court in the subsequent case of *Barclay v. Faber* (b). But, however this may be, the subsequent case of *Barratt v. Price* (c), recognised as it is in the case of *Robinson v. Yewens* (d) as laying down the proper rule in such cases, and as good law by the House of Lords in the case of *Hooper v. Lane* (e), may be considered as having settled the

(a) 3 *East*. 89.(b) 2 *B. & Ald.* 743.(c) 9 *Bing.* 566.(d) 5 *M. & W.* 149.(e) 6 *H. L. Ca.* 443.

principle on which the Courts should act upon such questions as that now before us. That principle appears to be this: that whenever an arrest by a detaining party would have been good, a detainer by him, being equivalent to an arrest, will be good also, unless it appears that the first arrest was a wrongful act of the sheriff himself, or that there was some collusion between him and the creditor making the arrest, or between him and the sheriff; and this seems consistent with reason and justice, as it would be a great hardship upon an innocent party to be prejudiced by the wrongful acts of other persons. The case of *Hooper v. Lane* (a) was decided upon the ground that the sheriff himself was a wrong doer in making the first arrest, or that the detaining creditor acted in collusion with the sheriff or the arresting creditor; and it is clear that, as against the detaining creditor, the protection given by the statute would not have applied, had the bankrupt been arrested by him.

It is unnecessary to consider whether the certificate of the Commissioner of the 29th *November* was or was not invalid (though we are disposed to agree with the Court of Exchequer upon this point), for in either case the statutory protection from arrest until the 3rd of *December* would have applied; but when that day was past, and no protection granted by the Court of Bankruptcy, there was nothing to prevent a creditor, who had proved his debt, from obtaining the Commissioner's certificate, and issuing a ca. sa. and arresting the bankrupt under it.

We are told that the Court of Exchequer can hardly be said to have come to an unanimous judgment, as

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Martin B. is said to have expressed opinions very much at variance with those of the rest of the Court; but however this may be, and entertaining as we do the highest respect for that Court and its members, we cannot agree with them in the opinion they have formed upon this case; and, for the reasons we have given, we think that the rule should be discharged.

Rule discharged (*a*).

(*a*) A writ of habeas corpus was subsequently obtained, on behalf of *Freston*, from the Court of Chancery, and on the return of that writ the full Court of Appeal in Chancery held that he was entitled to his discharge. *Ex parte Freston*, 30 *L. J. N. S. Ch.* 460.

Wednesday,
November 28th,
1860.

Thursday,
January 31st,
1861.

TURNIDGE, appellant, *against* SHAW, respondent.

Stat. 30 *G. 2.*
c. 21. s. 5.
enacts that,
for the better
preservation

CASE stated by justices of *Essex*, under stat. 20 & 21
Vict. c. 43.

of the fishery of the river *Thames*, within the jurisdiction of the mayor of *London*, as conservator of the river, it shall be lawful "for the deputy of the said mayor for the time being, as conservator as aforesaid, commonly called the water bailiff, and his assistant or assistants," appointed by warrant under the hand and seal of the mayor, to enter the boat of any fisherman or other person fishing on the *Thames*, and seize all brood of fish found there. Sect. 6 imposes a penalty of 10*l.* on any person "who shall obstruct or hinder the said water bailiff" or "his assistants," "in the execution of any of the powers vested in them by this Act;" and sect. 11 gives a convicted person a right of appeal to the next Court of Conservancy.

The *Thames* Conservancy Act, 1857, 20 & 21 *Vict. c. cxlvii.*, creates a new corporation, called "The conservators of the river *Thames*," and, by sect. 52, transfers to them "all the powers, authorities, rights and privileges," which might be exercised by the mayor of *London*," "by prescription, usage, charter, or Act of Parliament, or otherwise, with regard or relation to the conservancy and the preservation and regulation of the river *Thames*," save only so far as the same may be modified by, or be inconsistent with, the provisions of that Act. Sect. 76 imposes a penalty, not exceeding 5*l.*, on any person who "shall resist or make forcible opposition against any person employed in the due execution of this Act."

Held that, under the latter Act, although it does not apparently have the fishery of the *Thames* in contemplation, the conservators of the *Thames* are empowered to appoint, under their hands and seals, assistant river-keepers, with express authority to enter fishing boats and seize brood of fish, in pursuance of stat. 30 *G. 2. c. 21. s. 5.*; and that a person obstructing such an assistant river-keeper in so doing, is not liable to the penalty imposed by sect. 6 of that statute; but is liable to the penalty imposed by stat. 20 & 21 *Vict. c. cxlvii. s. 76.*

An information was preferred by *Thomas Turnidge*, of *Leigh*, in the said county, assistant river-keeper (the appellant), by direction of the conservators of the river *Thames*, against *Thomas Shaw*, of *Leigh* aforesaid, fisherman (the respondent), whereby the said *Thomas Shaw* was charged for that he did, on 11th *January*, 1860, at the parish of *Leigh* in the said county, obstruct and hinder the said *Thomas Turnidge* in the execution of the powers vested in him by the statute in such case made and provided, as an officer of the *Thames* conservators, duly appointed pursuant to such statute; whereby and by force of the said statute the said *Thomas Shaw* had forfeited the sum of 10*L*.

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At the hearing by the justices in Petty Sessions at *Rochford*, in the said county of *Essex*, the justices dismissed the information.

By stat. 30 *G. 2. c. 21. s. 5.* it is enacted that, "For the better preservation of the" "fishery of the" "river of *Thames*, and waters of *Medway*, within the jurisdiction" of the mayor of the city of *London*, as conservator of the river of *Thames* and waters of *Medway* (sect. 1), "and for preventing, as much as may be, any abuses from being committed therein, it shall and may be lawful for the deputy of the said mayor for the time being, as conservator as aforesaid, commonly called the water bailiff, and his assistant and assistants, such assistant and assistants having been named and appointed to be his assistant and assistants, by warrant under the hand and seal of the mayor of the said city for the time being, and likewise for all and every other person or persons who shall for that purpose be specially authorized by any warrant or warrants under the hand and seal of the said mayor, from time to time, and at all times, to

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enter into any boat, vessel or craft of any fisherman or drudgerman, or other person or persons fishing or taking fish, or endeavouring to take fish, upon the said river of *Thames*, or upon the said waters of *Medway*, within the jurisdiction aforesaid, and there search for, take and seize all spawn, fry, brood of fish," &c., "as shall then be in any such boat or boats, vessel or craft, in or upon the said river or waters; and to take and seize on the shore or shores adjoining to the said river, or waters of *Medway*, within the jurisdiction aforesaid, all such spawn, fry, brood of fish," &c., "as shall be there found."

By sect. 6 of the same statute it is enacted, "That if any person or persons shall obstruct or hinder the said water bailiff, his assistants, or any of the said officers, or any constable, headborough or other peace officer, in the execution of any of the powers vested in them by this Act, or of any warrant or warrants to be issued by the said mayor, recorder, or any alderman of the said city, or justice respectively, in pursuance of this Act;" "the person or persons so offending therein shall, for every such offence, forfeit the sum of 10/."

Sect. 11 authorizes the levy of penalties by distress; "but in case any such offender" "shall think himself" "aggrieved by such conviction, and shall within" "five days enter into a recognizance" "before such magistrate or magistrates, before whom he" "shall be so convicted (which said recognizance shall be returned, within the space of fourteen days, to the said Court of the mayor and aldermen), conditioned for his personal appearance at some Court of the said mayor and aldermen of the said city, to be holden within six weeks after the acknowledging such recognizance, or at the next Court of Conservancy to be held for the county in which such

offence shall be committed, and to stand to and abide such order as shall be made in the premisses by such Court," "the said Court of mayor and aldermen, or Court of Conservancy, is hereby empowered and directed upon a petition of appeal presented to them, by the party or parties so convicted, complaining of such conviction," "finally to hear and determine the matter of such appeal," "and the said Courts respectively" "are hereby empowered to order" "any" "penalties laid on or incurred by any of the parties complaining, to be mitigated, or to vacate or set aside such conviction," "or" "to ratify and confirm the same, and" "award such" "costs to be paid by the appellant as to them shall seem meet; And the said Court of mayor and aldermen, or Court of Conservancy, may, on forfeiture of any such recognizance, estreat the same."

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The *Thames* Conservancy Act, 1857, 20 & 21 *Vict. c. cxlvii. (a)*, by sect. 50, vests "all the estate, right, title, and interest of the mayor and commonalty and citizens of the city of *London*," "and all the estate, right, title, and interest" of Her Majesty "in the bed and soil and shores of the river *Thames*," within certain limits, in the conservators appointed under that Act; and by sect. 52 enacts that "From and after the commencement of this Act all the powers and authorities, rights and privileges, which are now vested in or which may have been or may be exercised by Her" "Majesty in right of her Crown, and all the powers and authorities, rights and privileges, at any time heretofore given or granted to, or which are now vested in, or which have been or may

(a) Local and personal, public. "To provide for the conservation of the river *Thames*, and for the regulation, management, and improvement thereof."

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be exercised by the mayor and commonalty and citizens, or by the mayor and aldermen of the city of *London*, or by the common council, or by the mayor for the time being of the said city, by prescription, usage, charter, or Act of Parliament, or otherwise, with regard or relation to the conservancy and the preservation and regulation of the river *Thames*, and of the several rivers, streams, and watercourses within the flow and reflow of the tides of the said river, within the limits aforesaid, and upon the banks, shores, and wharfs of the said river and the port of *London*, shall be and the same are hereby vested in the conservators by this Act appointed, to be by them exercised in the same manner, and under and subject to the same restrictions, as the same are now respectively legally exercised by Her Majesty, or by the mayor and commonalty and citizens, or by the said mayor and aldermen, or by the common council, or by the said mayor, save only and except so far as the same may be modified by or be inconsistent with the provisions herein contained."

Sect. 76 imposes a penalty, not exceeding 5*l.*, on any person who "shall resist or make forcible opposition against any person employed in the due execution of this Act, or shall assault any surveyor, engineer, or agent, or any collector of toll, in the due execution of his office."

Sect. 149 provides for the recovery of penalties before any justice, and sect. 161 gives an appeal to the Court of Quarter Sessions.

Previous to the coming into operation of The *Thames* Conservancy Act, 1857, the mayor, commonalty and citizens of the city of *London* had and exercised by the lord mayor for the time being, during his mayoralty,

or by his sufficient deputies, the conservation of the said river, between *Staines*, in the county of *Middlesex*, and *Yantlect*, otherwise *Yantlet*, in the county of *Kent*; and byelaws for the regulation of fishermen in the river *Thames* were made by the Court of the mayor and aldermen of the city of *London*, by virtue of stat. 30 G. 2. c. 21. s. 1.

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At the hearing of the information, the charge was supported by the conservators of the river *Thames*, who appeared by counsel and attorney. On behalf of the appellant it was proved to the satisfaction of the justices that, on 11th *January* last, the appellant went on board the respondent's boat, then lying at *Leigh* aforesaid, within the limits of the jurisdiction of the conservators of the river *Thames*, to examine the shrimps caught by the respondent; that he stated the object of his visit, and produced his appointment; that he saw in the respondent's boat a quantity of small shrimps which he considered "brood;" that he endeavoured to seize them, and that thereupon the respondent assaulted him and prevented the seizure.

The appointment of the appellant, under the seal of the conservators of the river *Thames*, was as follows. "Know all men by these presents that we, the conservators of the river *Thames*, have named and appointed, and by these presents do name and appoint, *Thomas Turnidge*, of *Leigh*, in the county of *Essex*, to be assistant river-keeper during our pleasure; and we do hereby authorize the said *Thomas Turnidge* to enter any boat, vessel or craft, of any fisherman, dredgerman, or other person or persons fishing or taking fish, or endeavouring to take fish, upon the said river of *Thames*, within our jurisdiction, and there to search for, take and

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unsizeable, unwholesome, or unseasonable fish, and also
TURNIDGE all unlawful nets, engines and instruments for taking or
V. destroying fish, as shall then be in any such boat or
SHAW. boats, vessel or craft, in or upon the said river, and to
take and seize, on the shore or shores adjoining to the
said river, within the jurisdiction aforesaid, all such
spawn, fry, brood of fish, spat of oysters, unsizeable,
unwholesome, or unseasonable fish, and also all unlawful
nets, engines or instruments for taking or destroying
fish, as shall there be found; and, after taking or seizing
such unlawful nets, engines or instruments, or any
spawn, fry, brood of fish, spat of oysters, or unsizeable,
unwholesome, or unseasonable fish, you, the said *Thomas*
Turnidge, are to bring, or cause the same to be brought,
before the mayor of the city of *London* for the time
being, or the recorder of the said city, or one of the
said aldermen of the said city, if seized within the limits
of the said city of *London* and liberties thereof, either
upon the said river, or on shore, or before the mayor of
the said city, or the recorder of the said city, or one of
the aldermen of the said city, or one of Her Majesty's
justices of the peace of the county in which such seizure
shall be made, if made upon the said river, out of the
limits of the said city, or the liberties thereof, but within
our jurisdiction as aforesaid, or before one of Her Ma-
jesty's justices of the peace of the county in which the
same shall be seized on shore, in order that all such
unlawful nets, engines, or instruments, as also all such
spawn, fry, or unsizeable, unwholesome, or unseasonable
fish, as shall be seized as aforesaid, may be forthwith
burnt or destroyed, and the party from whom the same
shall be taken punished according to law. And you are

to receive no money, gratuity, or reward whatsoever, from any person, to prevent, delay, or hinder any prosecution; or compound, or wilfully conceal, any offence which shall be committed contrary to an Act of Parliament made and passed in the 30th year of the reign of His late Majesty King *George* the Second, intituled ‘An Act for the more effectual preservation of the spawn and fry of fish, and for the better regulating the fishery thereof’ (a), which shall come to your knowledge; under pain to forfeit and lose 5*l.* for each time you shall be convicted of every such offence; and from time to time to apprise us thereof. Given under our seal this 7th day of *December*, 1859.”

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It was contended by the counsel for the appellant that, by force of sects. 50 and 52 of The *Thames* Conservancy Act, 1857, the bed and soil of the river *Thames*, with the fishery and all the powers relating thereto, given to the mayor of *London*, and the protection extended to his officers by stat. 30 *G. 2. c. 21. ss. 5.* and 6, were transferred and extended to the conservators of the river *Thames* and their officers.

The justices doubted the correctness of this view, and dismissed the information: First, because it appeared to them that, assuming the powers of stat. 30 *G. 2. c. 21. s. 5.* to be transferred to the conservators, it must also be held that the jurisdiction on appeal, under sect. 11, is likewise vested in them, and the respondent, if convicted, would be without appeal, except to his prosecutors. If, to avoid this, the justices held that stat. 30 *G. 2. c. 21. s. 11.* (the appeal clause) was modified by sect. 161 of The *Thames* Conservancy Act, 1857, then they considered that they must also hold that stat. 30 *G. 2. c. 21.*

(a) Stat. 30 *G. 2. c. 21.*

1861. *s. 6. (the penal clause) is modified by sect. 76 of The Thames Conservancy Act, 1857; and that the defendant would be liable to be sued only for the reduced penalty imposed by the latter section.*

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Secondly; because, although the bed and soil of the river *Thames*, which were in the Crown, are transferred to the conservators by the 50th section of The *Thames Conservancy Act*, the justices doubted whether the fishery, which was common to all (1 *Mod.* 105), was thereby transferred, and they also doubted whether the powers of stat. 30 *G. 2. c. 21.*, an Act having exclusive reference to the fishery, were powers with regard or relation to the conservancy, preservation and regulation of the river *Thames*, and, as such, vested in the conservators by the 52nd section of The *Thames Conservancy Act*, 1857; all the provisions of which appeared to them to have especial reference to the navigation of the river and the regulation of the port of *London*.

The questions of law for the opinion of the Court were: First, are the conservators of the river *Thames* authorized to appoint officers to exercise the powers given to the water bailiffs of the city of *London* by stat. 30 *G. 2. c. 21. s. 5.*?

Secondly, are such officers entitled to the protection given by the 6th section of the same statute?

Thirdly, is the jurisdiction on appeal, given to the mayor and aldermen by the 11th section of the same Act, now vested in the conservators of the river *Thames*?

Fourthly, is the 76th section of The *Thames Conservancy Act* applicable to the offence charged against the respondent; and is the penalty thereby imposed cumulative or substituted?

If the Court should be of opinion that the justices

were right in law in dismissing the said information, their determination was to be affirmed. But, if the Court should be of a contrary opinion, it was to be reversed.

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Sir *W. Atherton*, Solicitor General, for the appellant (*a*), argued that, under The *Thames Conservancy Act*, 1857, the conservancy of the fishery, as well as of the navigation, of the *Thames* was transferred to the conservators of the river *Thames*, created by that Act. In support of his argument, he referred to stats. 17 *R. 2. c. 9.*, headed "Justices of peace shall be conservators of the statutes touching salmons"; 1 *Eliz. c. 17.*, "An Act for preservation of spawn and fry of fish," by sect. 6 of which "The mayor of the city of *London* for the time being, and all and every other person and persons, bodies politic and corporate, which" "lawfully" had "or ought to have any conservation or preservation of any rivers, streams or water, or punishments and corrections of offences committed in any of them," were empowered to inquire into and determine all offences committed against the Act "within his or their" "jurisdiction and conservancy;" and 9 *Ann. c. 26.*, "An Act for the better preservation and improvement of the fishery within the river of *Thames*, and for regulating and governing the Company of fishermen of the said river," which, also, by sect. 6, gave jurisdiction to determine complaints, to the lord mayor and aldermen of the city of *London*, or any one of them, "for all offences committed within the jurisdiction of the said lord mayor, as conservator of the said river of *Thames*;" as shewing that the conservancy

(*a*) In last *Michaelmas Vacation*, *Wednesday, November 28th*, 1860.

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of the river involved the power to protect the fishery. He also cited 4 *Inst.* 250, and the *Privilegia Londini*, tit. "Court of Conservancy for the river *Thames*," p. 393 (ed. 3); and argued that, upon the true construction of stat. 20 & 21 *Vict. c. cxlvii. s. 52.*, the conservators of the *Thames* had authority to appoint the appellant assistant river-keeper, with all the powers before exercised, under stat. 30 *G. 2. c. 21. s. 5.*, by assistants of the water-bailiff; and that the respondent was liable to conviction, either under stat. 30 *G. 2. c. 21. s. 6.* or under stat. 20 & 21 *Vict. c. cxlvii. s. 76.*, for obstructing the appellant in the execution of his statutory duties.

No counsel appeared for the respondent.

Cur. adv. vult.

BLACKBURN J. now delivered the judgment of the Court (a). In this case a question of considerable difficulty arises on the construction of The *Thames* Conservancy Act, 1857, 20 & 21 *Vict. c. cxlvii.*; which, by sect. 52, transferred to a newly created corporation, called "The Conservators of the river *Thames*," amongst other things, all the powers and authorities, rights and privileges" which might be exercised by the Queen, in right of her Crown, or by the mayor and commonalty of the citizens of *London*, or by the mayor and aldermen, or by the mayor of *London*, "by prescription, usage, charter, or Act of Parliament, or otherwise, with regard or relation to the conservancy and the preservation and regulation of the river *Thames*," "to be by them exercised in the same manner, and under and subject to the same

(a) *Wightman and Blackburn Js.*

restrictions, as the same are now respectively legally exercised by Her Majesty, or by the mayor," &c., "save only and except so far as the same may be modified by or be inconsistent with the provisions" "contained" in that Act.

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Amongst the powers of the city of *London* was that of holding the Court for the conservation of the water and river of *Thames*; and it is said, in 4 *Inst.* 250, that "The mayor of *London* for the time being hath the conservation and rule of the water and river of the *Thames*, &c., and authority as touching punishment for using unlawful nets and other unlawful engines in fishing, and to all correction and punishment there concerning unlawful nets and engines there." By stat. 30 *G. 2. c. 21.*, for the better protection of the fishery, it is, by sect. 5, enacted that it shall be lawful "for the deputy of the said mayor for the time being, as conservator as aforesaid, commonly called the water-bailiff," and his assistants appointed by warrant under the hand and seal of the mayor, to enter fishing boats, and seize brood of fish found there. Since the passing of The *Thames* Conservancy Act the appellant has been appointed assistant river-keeper, by warrant under the seal of the conservators of the *Thames*, and is, as far as they can empower him, authorized to exercise the powers conferred by stat. 30 *G. 2. c. 21. s. 5.* on the assistants of the deputy of the lord mayor as conservator. The first question asked us is, whether the new corporation were authorized to make such an appointment. There is certainly nothing in the provisions of The *Thames* Conservancy Act to shew that the Legislature had their attention called to the fisheries; but there is nothing to be found restricting the very general language used in the 52nd section; and it seems to us

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that the powers given to the mayor of *London* to appoint persons as assistants in exercising the powers given to the water-bailiff, as deputy of the mayor as conservator, are powers relating to the conservancy of the *Thames*, and are consequently transferred to the conservators of the *Thames*.



The next question is one of much more difficulty. The 6th section of stat. 30 *G. 2. c. 21.* imposes a penalty of 10*l.* on any person obstructing the said water-bailiff or his assistants, in the execution of that Act, and by sect. 11 there is an appeal given to the Court of Conservancy. The respondent in the present case had forcibly resisted the appellant in the execution of his duty as an assistant river-keeper, appointed by the conservators of the *Thames*, but exercising the powers originally conferred by stat. 30 *G. 2.* on the water-bailiff and his assistants appointed by the mayor. He was summoned before the justices, who refused to impose on him the penalty of 10*l.* under sect. 6 of stat. 30 *G. 2. c. 21.*; and we think the justices were right. The officer appointed by the conservators has, we think, all the powers and authorities, rights and privileges, of the former officer, appointed by the mayor as conservator, and any one obstructing him must take the consequences which, at common law, would follow from obstructing a person having authority. But it seems to us that the penalties beyond the common law, which were imposed on those who obstructed the former officers, cannot be extended, by mere implication, to those obstructing the new officers; it requires something to shew that the Legislature intended so to extend them, and there are no words in The *Thames* Conservancy Act that have the slightest tendency to express such an

intention. If the Legislature had meant the penal clause to extend to the new officers, they would certainly have made some provision as to the appeal, which is now made inoperative. In fact, it seems very plain that the question as to what was to be done with regard to the fisheries was not present to the minds of those who framed the Act, who very naturally thought only of the commerce and navigation of the *Thames*.

But we think that the officer employed in exercising the powers originally conferred by stat. 30 *G. 2. c. 21.*, but which he puts in execution only by virtue of The *Thames Conservancy Act*, is a person employed in the due execution of the latter Act, within the meaning of sect. 76 of that Act; and, consequently, we think that the justices have jurisdiction in such a case to impose a penalty of 5*l.* under that Act, subject to the appeal given to the Court of Quarter Sessions.

What we have above written disposes of all the questions put to us, and with that expression of our opinion the case should go back to the justices.

Case remitted to the justices.

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Thursday,
January 31st.

OWEN and another *against* NICKSON and another.

Detinue for title deeds. Plea, on equitable grounds, that before the detention, and in the lifetime of *M. P.*, since deceased, through whom plaintiffs claimed, the deeds belonged to *M. P.*, who agreed with *J. N.* to deposit them with him, by way of equitable mortgage to secure the repayment of money lent by him to *M. P.* That from the time of that agreement to his death, *J. N.* held the deeds on the terms aforesaid; and

died, having appointed defendants executrixes of his will, which they proved. That thereupon the deeds came into, and thence till action brought continued in, the possession of defendants as such executrixes; and that none of the money lent by *J. N.* to *M. P.* had ever been paid. That, therefore, defendants detained and detain the deeds; which was the detention in the declaration mentioned.

Plaintiffs, who were trustees of *M. P.*'s marriage settlement and also her executors, administered interrogatories to defendants, who, in answer, admitted that they had in their possession a memorandum of a specified date, signed by *M. P.*, agreeing that the deeds should remain in the custody of *J. N.* till repayment of the moneys advanced by him to *M. P.*

Held that plaintiffs, on an affidavit stating that they were entirely ignorant of the said memorandum, and had no means of ascertaining anything of its contents, and that it was material and necessary, in order to prosecute the action, that they should have inspection of it, were entitled to inspection of the memorandum, and also to be furnished by defendants with particulars of the lien or mortgage on the deeds relied upon by them.

MANISTY had obtained a rule calling upon the defendants to shew cause why the plaintiffs or their attorney should not be at liberty to inspect an alleged memorandum of 6th *July*, 1836, creating a lien on, or an equitable mortgage of, the deeds sought to be recovered in the action, set up by the defendants in a plea pleaded by them; and why the defendants should not deliver to the plaintiffs or their attorney particulars of the alleged lien or mortgage.

The action was one of detinue, to recover a deed of settlement made on the marriage of the Rev. *Robert Pryce* and *Martha* his wife, dated 20th *September*, 1784, and divers other deeds specified in the declaration.

The defendants pleaded, on equitable grounds, that, before the detention in the declaration mentioned, and in the lifetime of one *Martha Pryce*, now deceased, the said title deeds, papers, parchments and writings

belonged to and were the property of the said *Martha Pryce*, under and through whom the plaintiffs claimed ; and she, being indebted to one *Jonathan Nickson* in certain sums of money which he had before then lent and advanced to her, agreed with the said *Jonathan Nickson* that he should have and hold the said title deeds, papers, parchments and writings as a security, by way of equitable mortgage, to secure the repayment of the said sums of money ; and the said *Jonathan Nickson* thereupon, then and thenceforth, until and at the time of his death as hereinafter mentioned, had and held the said title deeds, papers, parchments and writings, for the purpose and upon the terms aforesaid, the said sums of money during all that time remaining and being unpaid. And the defendants further say that the said *Jonathan Nickson* afterwards died, and by his last will and testament in writing, duly made and published, appointed the defendants executrixes of his said last will and testament, who, after the death of the said *Jonathan Nickson*, duly proved the said last will and testament ; whereupon the said title deeds, papers, parchments and writings came into, and thence until and at the time of the said detention thereof in the declaration mentioned were, and still are, in the possession of the defendants, as executrixes aforesaid, for the purpose and upon the terms aforesaid, the said sums of money then and still remaining and being unpaid ; wherefore the defendants detained and still detain the said title deeds, papers, parchments and writings, for the cause aforesaid, which is the detention in the declaration mentioned.

It appeared from the affidavits that the plaintiffs were the trustees under a settlement made, on the marriage

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of *John Lewis* with *Martha Pryce*, by lease and release, on 30th *August* and 2nd *September*, 1839. The plaintiffs believed that *Jonathan Nickson* died about 13th *May*, 1846. The said *Martha Pryce*, then *Martha Lewis*, appointed the plaintiffs trustees under the said settlement, and granted, assigned and transferred the trust property to them as such trustees, and also appointed them executors of her will.

The plaintiffs obtained leave to deliver interrogatories to the defendants, of which the following only is material. "Have you, or has either of you, or your solicitor, or any other person for you, in your or their possession, power, or control, any memorandum signed by the said *Martha Lewis*, or any person on her behalf, relating to the mortgage or deposit of any such deeds, papers, writings or documents with *Jonathan Nickson*, late of *Wem*, in the county of *Salop*, an attorney or solicitor?" To which the defendants answered as follows: "We believe our solicitor has in his possession a memorandum, bearing date 6th *July*, 1836, signed by *Martha Pryce*, agreeing that all her writings and instruments should remain in the hands or custody of the said *Jonathan Nickson* until repayment of the moneys advanced by him to her, and also all interest in respect thereof; and we believe that such moneys, with arrears of interest thereon, remain unpaid."

The plaintiffs made an affidavit that they were entirely ignorant of the said memorandum; that they had no means of ascertaining anything of its contents; and that it was material and necessary, in order to prosecute the action, that they should have inspection of it.

Phipson now shewed cause. First, the plaintiffs are

not entitled to inspect the memorandum of deposit, of 6th July, 1836. *Browne v. Lockhart* (a) shews that, in equity, a mortgagee is not bound to produce his mortgage deed to the devisee of the mortgaged estate, until payment of principal and interest; notwithstanding the devisee may be ignorant of the amount of the interest, the time of payment, and all the other particulars of the security. The present plaintiffs fail to shew that their own case will be either made out or materially supported by inspection of the memorandum. [*Crompton J.* They may be entitled to inspect it on the ground that the defendants' plea in effect sets it up as an answer to the action. In *Price v. Harrison* (b) *Williams J.* says, "Wherever the instrument is declared on the rule is fully established, since the passing of The Common Law Procedure Act, 1852, that the defendant is entitled to inspection in the nature of oyer, not only where the instrument declared on is a deed under seal, but also in the case of contracts not under seal." "It may now be considered as fully established in all the Courts that the right to inspect extends to any writing, whether under seal or not, which is relied on by the other side as the foundation of his claim or defence."] *Scott v. Walker* (c) shews the limits within which a party is entitled to inspection of documents in the possession of the opposite party; namely, that such inspection may be granted for the purpose of obtaining any evidence necessary to support the original case of the party applying, or to meet that of the other side; but not for the purpose of obtaining information shewing how the case of the other side will be supported. The plaintiffs, here, do not shew by their

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(a) 10 *Sim.* 420.(b) 8 *C. B. N. S.* 617. 634.(c) 2 *E. & B.* 555.

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affidavit how the memorandum will support their own case, or meet that of the defendants. In *Adams v. Lloyd* (a) the Court of Exchequer held that, if a party interrogated under sect. 51 of The Common Law Procedure Act, 1854, as to whether he has in his possession any deeds or writings relating to lands in dispute, answers on oath that he has, but that such deeds relate exclusively to his own title to the lands, and do not shew any title in the opposite party, he cannot be compelled to state the contents of the deeds, or to describe them, his oath as to their effect being conclusive. *Pollock* C. B., in giving judgment, said (b), "The question is, whether the plaintiff is bound to produce his title deeds. To compel him to do so would introduce a new rule, which certainly was never intended by this Act of Parliament, and would render a title deed of no more importance than a bill of exchange or any other written document. I think that a man's title deed is still protected unless it tends to prove the case of the opposite party; if it does not, it is irrelevant. The recent changes in the law have made no alteration in that respect." And *Watson* B. (c): "The authorities are clear, that a person is not entitled in equity to a discovery of title deeds unless they contain evidence of his own title." Secondly, the plaintiffs fail to shew any ground for asking the defendants for particulars of the alleged lien or mortgage. In order to entitle themselves to such particulars, the plaintiffs are bound to shew that the mortgage debt has been paid, and nothing remains due; but their affidavits do not even state that any part of the debt has been paid.

(a) 3 H. & N. 351.

(b) 3 H. & N. 364.

(c) 3 H. & N. 367.

Manisty, contra.—The plaintiffs are entitled to inspect the memorandum; if on no other ground, under the well known rule stated by *Williams J.* in *Price v. Harrison (a)*, that where a plaintiff founds his declaration, or a defendant his plea, upon a document in writing, whether or not it be under seal, the opposite party has a right to see that document. [*Wightman J.* Your case is stronger than was that of the defendant in *Price v. Harrison (a)*, who was allowed to inspect a number of his own letters written to the plaintiff, of which he had not kept copies. Here, the plaintiffs ask for inspection of a single document, and one in which they probably have as great an interest as the defendants.] (He was then stopped.)

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(COCKBURN C. J. was absent.)

WIGHTMAN J. It appears to me that there is nothing in the decision in *Scott v. Walker (b)* to affect the present plaintiffs' right to the inspection for which they ask. No doubt, a plaintiff is not entitled to inspect a document which makes out the defendant's case solely; but here there is only one document, and both plaintiffs and defendants have an interest in it. The holder of a document in which another person is interested may be deemed a trustee of it for that other, within the old rule that inspection is to be granted of documents in the possession of the opposite party as trustee for the party asking for the inspection. As to the particulars, also, of the defendants' lien or mortgage, I see no reason why the plaintiffs should not have them.

(a) 8 C. B. N. S. 617. 634.

(b) 2 E. & B. 555.

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CROMPTON J. I also think that this rule should be made absolute. First, as to the particulars for which the plaintiffs ask. According to the ordinary practice, they ought to be given; by analogy to the case of a plea of set-off, under which particulars must be given, in order to do away with the hardship on the plaintiff which would otherwise be caused by the generality of the plea. Next, as to the memorandum. I think that inspection of it ought to be granted to the plaintiffs, who, in one sense, may be said to be interested in it. I concur in what has been said, as to that, by my brother *Wightman*; and I am also disposed to agree in the dicta of *Williams J.* in *Price v. Harrison* (a), with this qualification, that, although the document of which inspection is sought is relied upon in the pleadings of the party in whose possession it is, the inspection ought not to be granted if the Court sees that the application is made for an improper purpose. The distinction between documents under seal and not under seal has, of late, been done away with for many purposes, and I am satisfied that it cannot have been the intention of the Legislature, in abolishing oyer, to abrogate the general right of litigants to inspect documents set up against them in the pleadings of their opponents. Any abuse of that right is effectually prevented by the matter being left in the discretion of the Court.

HILL J. I am of the same opinion. I think that the interest which the plaintiffs have in the memorandum entitles them to the inspection which they seek; and that they are also entitled thereto, according to the rule laid down in *Price v. Harrison* (a). In making

(a) 8 C. B. N. S. 617. 634.

this rule absolute, it does not seem to me that we are going counter to the principles upon which the Courts of equity act. In *Latimer v. Neate* (a), *Latimer* claimed to be the lawful owner of goods and chattels in the visible user and enjoyment of the Duke of *Marlborough*, and *Neate*, a judgment creditor of the Duke, filed a bill against him and *Latimer*, charging that bills of sale and assignments of the said goods and chattels had been executed by the Duke to *Latimer* without consideration, and that they were void as against *Neate*. *Latimer*, by his answer, admitted that the bills of sale and assignments were in his possession, but said that they were executed to him for full consideration, and that the Duke had only the permissive, not the absolute, use of the goods; and *Latimer*, by his further answer, claimed to have an equitable lien on the goods for money advanced; and he set forth in a schedule abstracts of the bills of sale and assignments. It was held that *Neate* was entitled to inspection of the bills of sale and assignments, on the grounds, first, that these instruments were only a mortgage security; and, secondly, that *Neate* had a right to see if the abstracts corresponded with the originals, in order to ascertain what he would have to pay to *Latimer* in redeeming the mortgage. That case is very nearly in point, and authorizes us to make the order for inspection. As to the particulars, also, I think that the plaintiffs are entitled to the order. Now that a general mode of pleading is allowed, the Court will always assist a party who is embarrassed thereby.

Rule absolute.

(a) 4 Cl. & Fin. 570.

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CASES

ARGUED AND DETERMINED

IN

HILARY VACATION,

XXIV. VICTORIA.

The Judges of the Court of Queen's Bench who sat in
Banc in this Vacation were:

COCKBURN C. J.

WIGHTMAN J.

HILL J.

CROMPTON J.

BLACKBURN J.

Wednesday,
February 6th.

MARPLES *against* HARTLEY.

Stat. 17 & 18
Vict. c. 36. s. 1.
enacts that
every bill of
sale of personal

THIS was an interpleader issue, to try the title to certain goods seized in execution, on 5th *July*, 1860, chattels shall be filed "within twenty-one days after the making or giving of such bill of sale," "otherwise such bill of sale shall," "as against all sheriff's officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of law or equity authorizing the seizure of the goods of the person by whom" "such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time" "of executing such process," "and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale."

Held that, under this enactment, the assignee of goods assigned by a bill of sale has twenty-one days from the date of the bill of sale, within which he may either file the bill of sale or take the goods out of the apparent possession of the assignor. That therefore, the title of such assignee to the goods is not defeated by their seizure, while in the apparent possession of the assignor but before the twenty-one days have expired, under a *f. fa.* issued against the goods of the assignor by an execution creditor.

by the sheriff of *Derbyshire*, under a writ of *fi. fa.* dated 3rd *July*, 1860. 1861.

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At the trial, before *Erle C. J.*, at the *Derbyshire* Summer Assizes, 1860, it appeared that the writ of *fi. fa.* was issued on a judgment obtained by the present defendant against one *Shemwell*, and that the goods, when seized under the writ, were in the possession of *Shemwell*. On 27th *June*, 1860, *Shemwell* made a bill of sale of his goods to the plaintiff; in which the goods seized under the *fi. fa.* on 5th *July* were included. At the time of that seizure the bill of sale had not been enrolled; and it was contended for the defendant that, on that account, the plaintiff could not recover. *Erle C. J.*, however, held that the plaintiff was not precluded, under stat. 17 & 18 *Vict. c. 36. s. 1.*, from recovering by reason of his not having enrolled the bill of sale before the seizure of the goods. The plaintiff accordingly had a verdict: and leave was reserved to the defendant to move to set it aside, and to enter a verdict for the defendant instead thereof.

Field had obtained a rule to that effect.

Hayes Serjt. now shewed cause. The goods, when seized by the sheriff, were the property of the plaintiff. Stat. 17 & 18 *Vict. c. 36. s. 1.* enacts that every bill of sale of personal chattels shall be filed "within twenty-one days after the making or giving of such bill of sale," "otherwise such bill of sale shall," "as against all sheriff's officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of law or equity authorizing

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the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time" "of executing such process," "and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale." This section gives the person to whom a bill of sale is made twenty-one days from its date in which to file it; and if, as in the present case, process issues and is executed against the goods of the assignor within those twenty-one days, the bill of sale is not thereby made null and void. The true construction of the section is, that it gives an execution creditor a better title to goods left in the possession of the execution debtor, than a person claiming them under a bill of sale from the debtor, if twenty-one days have elapsed from the date of the bill of sale, and if, notwithstanding, the bill has not been filed: but that it does not require the bill to be filed before the last of the twenty-one days. [*Hill J.* The statute makes the bill of sale, if not filed, null and void, so far as regards the property in or right to the possession of goods which, at or after the time of executing process against the goods of the assignor, are in his apparent possession. And, by sect. 7, the goods are to be deemed in the "apparent possession" of the assignor, "so long as they shall remain or be in or upon any house," "land, or other premises occupied by him," "notwithstanding that formal possession" of them

“may have been taken by or given to any other person.”] That definition of “apparent possession” does not apply to goods remaining on the premises of the assignor after they have been taken in execution. But, assuming that it does, the statute evidently contemplates an apparent possession continuing beyond the twenty-one days.

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Field was then called upon to support the rule.

Field, in support of the rule. The statute requires that the bill of sale should have been filed before the goods are actually seized under process against the assignor; whether or not the seizure takes place within the twenty-one days. [*Hill J.* Are you not bound to shew that the apparent possession by the assignor continued beyond the twenty-one days? *Wightman J.* If the time allowed by the Act for filing the bill of sale has not elapsed before the goods are taken in execution, how has the assignee, at the time of the seizure, failed to comply with the requirements of the Act?]]

COCKBURN C. J. This is a very clear case. The statute requires that, in order that a bill of sale of goods may be null and void as against the assignee, the assignor shall be left in apparent possession of the goods for twenty-one days after the bill of sale is given, and that the bill of sale shall not have been filed within that period. The assignee has, therefore, twenty-one days from the date of the bill of sale, within which either to take the goods out of the assignor's possession, or to perfect his own title to them by filing the bill of sale. During the

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WIGHTMAN J. and HILL J. concurred.

Rule discharged.

Wednesday,
February 6th.

ANDERSON against The MIDLAND Railway
Company.

Stat. 11 G. 2.
c. 19. s. 1.
enacts that
"In case any
tenant" "for
life or lives,
term of years,
at will, suffer-
ance, or other-
wise, of any
messuages,
lands, tene-
ments, or
hereditaments,
upon the
demise or

THE first count of the declaration alleged that defendants were common carriers, for hire, of goods and chattels, from a certain station, at *Defford*, in the county of *Gloucester*, to *Bristol*; and that, on 24th September, 1859, plaintiff caused to be delivered to them, as such carriers, certain goods and chattels, to be taken care of and carried by them from the said station at *Defford* to *Bristol*. Breach, that defendants did not carry the said

holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away" "from such premises, his" "goods or chattels, to prevent the landlord" "from distraining the same for arrears of rent so reserved, due, or made payable," the landlord may, within thirty days next after such fraudulent removal, follow and seize the goods as a distress for the arrears of rent due.

A., in May, 1859, entered into an agreement, not under seal, with M., by which M. agreed forthwith to grant A. a valid lease under seal of a house and premises, for three years from 25th May, 1859, at the yearly rent of 84*l.*, payable quarterly. The agreement specified the lessor's and lessee's covenants to be contained in the lease; and it concluded as follows; "It is hereby mutually agreed that these presents shall operate as an agreement only; and that, until a lease shall be executed, the rent, covenants and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed." No lease was drawn up, but A. entered into possession, and remained till a quarter's rent became due, when he fraudulently removed his goods from the premises, to prevent their being distrained.

Held that the agreement, coupled with A.'s entry into possession, made A. tenant at will to M. at a fixed reserved rent, for which M. had a right to distrain; and that, therefore, M. was entitled, under stat. 11 G. 2. c. 19. s. 1., to follow and seize A.'s goods.

goods to *Bristol*; and that, by defendant's negligence, the said goods were wholly lost to plaintiff.

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Second count. For that the goods were so delivered to defendants, to be carried to *Bristol*, as in the first count mentioned; and that defendants promised plaintiff to carry them safely to *Bristol* and deliver them to plaintiff there, within a reasonable time. Breach, that defendants would not, within such reasonable time, carry the said goods to *Bristol*, or deliver them there to plaintiff, and that the said goods were wholly lost to plaintiff.

Third count. Trover for the goods.

Pleas. 1. To first count, except to so much of the breach as charges negligence and carelessness: That, before the delivery of the said goods to defendants, plaintiff, then being a tenant for a term of years of a messuage and hereditaments, upon the demise of which rent was reserved, fraudulently and clandestinely did convey from such messuage and hereditaments the said goods and chattels in the said first count mentioned, the same then being his goods and chattels, to prevent one *Marsden*, the landlord, from distraining the same for certain arrears of the said rent then due and payable; and brought the same to the said station, and then, as in the said first count mentioned, caused the same to be delivered to the defendants at the said station. Averments: That, within the space of thirty days next ensuing the said carrying away of the said goods and chattels, and before the committing of the breach herein pleaded to, or any part thereof, the said *Marsden*, being such landlord as aforesaid, took and seized the said goods and chattels, then found at the said station, as a distress for the said arrears of the said rent, as the said *Marsden* law-

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fully might, according to the statute in such case made and provided; and that defendants, by their servants, suffered the said seizure to be made, and afterwards, at the request of the said *Marsden*, the said arrears still continuing due, kept the same impounded as such distress, at the said station, for the said *Marsden*, until the said *Marsden*, while the said arrears were still due, took the same as such distress out of the possession of defendants with their consent, and sold the same under the said distress; whereby the same were lost to the plaintiff, and the defendants were prevented from carrying the said goods, and committed the breach herein pleaded to. Issue thereon. 2. A similar plea to the second count. Issue thereon.

At the trial, before *Hill J.*, at the *Worcestershire* Summer Assizes, 1860, it appeared that the plaintiff, in the month of *April*, 1859, had entered into a negotiation with a *Mrs. Marsden*, for the hiring of a house and premises at *Kempsey*, in *Worcestershire*, of which she was the owner. In *May*, 1859, an agreement was entered into between *Mrs. Marsden* and the plaintiff, which, so far as it is material, was as follows.—“An agreement,” “whereby the said *H. Marsden* agrees to and with the said *G. Anderson*,” “that the said *H. Marsden*” “will, by indenture to be forthwith prepared, and to be duly executed by the said parties hereto, grant unto the said *G. Anderson*” “a valid lease in law of all that dwelling house and premises” &c., “to hold the same unto the said *G. Anderson*, for the term of three years from 25th *May* instant, at the yearly rent of 84*l.*, payable by four equal quarterly instalments, on” &c. “And it is hereby mutually agreed that in such lease shall be contained covenants on the lessee’s part as follows”

(The covenants were here set out.) "And the said *G. Anderson* doth hereby" "agree with the said *H. Marsden*" "that the said *G. Anderson* will accept such lease on the terms and conditions aforesaid, and pay one moiety of the charges thereof." "And the said *H. Marsden*" "agrees with the said *G. Anderson*" "that in such lease shall be contained a covenant for quiet enjoyment by the said *G. Anderson* during the said term. And it is hereby mutually agreed that these presents shall operate as an agreement only; and that, until a lease shall be executed, the rent, covenants and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed."

The plaintiff was then let into possession of the house and premises, and continued to reside there till after the first quarter's rent became due according to the terms of the agreement. Application was made for the amount due, but he refused to pay, alleging that certain repairs had not been completed according to Mrs. *Marsden's* promise. On 23rd September, 1859, he removed all the effects which he had in the house to the *Defford* Station, on the defendants' railway, where they were soon afterwards seized by Mrs. *Marsden*, to whom the defendants gave them up. It was clearly made out that the goods had been fraudulently and clandestinely removed by the plaintiff; and the jury, under the direction of the learned Judge, returned a verdict for the defendants, leave being reserved to the plaintiff to move to enter the verdict for him.

Pigott Serjt. had obtained a rule, calling upon the

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defendants to shew cause why the verdict should not be set aside, and a verdict, with 75*L.* damages, entered for the plaintiff instead thereof, on the grounds that the agreement between the plaintiff and *Marsden* was not a demise; that there was no right to distrain; and that there was no right in the landlord to take the goods as a distress for rent.

Phipson now shewed cause. The other side will say that the agreement between the plaintiff and Mrs. *Marsden* did not amount to a demise; and that, inasmuch as the plaintiff's occupation of the house under it was not as tenant under a demise whereby rent was reserved, due, or made payable, within the meaning of stat. 11 *G. 2. c. 19. s. 1.*, Mrs. *Marsden* had no right, under that statute, to follow and distrain the plaintiff's goods. That statute enacts that "In case any tenant or tenants, lessee or lessees for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable;" the landlord or landlords may, within thirty days next ensuing such conveying away or carrying off such goods and chattels, take and seize them, wherever they shall be found, as a distress for the said arrears of rent. Now, whatever was the effect of the agreement, it is clear that the plaintiff, by going into occupation of the house in pursuance of it, became a tenant to Mrs. *Marsden*, within

the very general language of the statute. And even if the reference, in the agreement, to a future lease to be drawn up, prevents the agreement from being a demise, strictly speaking, at all events it created a "holding" at a fixed rent, within the meaning of the statute. The agreement did, however, create a demise sufficient to satisfy the Act. It shews an apparent intention, on the face of it, that Mrs. *Marsden* should give, and the plaintiff should take, possession of the house, at a fixed yearly rent; and it expressly provides that the rent shall be paid, and all the other stipulations observed, before the contemplated lease is executed, in the same manner as if that lease had been drawn up at once. It therefore amounted to a present demise, at a rent certain, and, being acted upon by the plaintiff's entry into possession, created the status of landlord and tenant between the parties, which is all that the statute requires. In *Pinero v. Judson* (a) an agreement precisely similar in effect to the present was held to amount to an actual demise. (He was then stopped.)

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Dowdeswell, in support of the rule. *Pinero v. Judson* (a) was decided before the passing of stat. 8 & 9 Vict. c. 106., by sect. 3 of which "A lease, required by law to be in writing, of any tenements or hereditaments," "made after" "1st October, 1845, shall" "be void at law, unless made by deed." The present agreement, either as a lease for a term of more than three years from the making thereof, or as the grant of an uncertain interest in lands, was required by the Statute of Frauds to be in writing, and is therefore, not being under seal, void at

(a) 6 Bing. 206.

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law. [*Wightman* J. Do you say that the plaintiff was a trespasser in going into occupation of the house?] It may be admitted that he became tenant at will; but not at a fixed rent. [*Cockburn* C. J. He agreed to pay a certain rent, and that the respective rights and remedies of the landlord and himself should be enforceable just as though a lease had been executed.] That would not turn the executory demise contemplated by the agreement into an actual present demise. Although an intended lessee who enters into possession under a mere agreement for a lease, not amounting to an actual demise, becomes thereby tenant at will, an actual tenancy at an agreed rent, recoverable by distress, is not created until he pays part of the agreed rent, or does something equivalent; *Hegan v. Johnson* (a), *Dunk v. Hunter* (b). [*Hill* J. Those cases proceeded on the ground that the parties to the agreements had left it doubtful when the tenancy was to commence, or the rent to become due. But in the present case, as in *Pinero v. Judson* (c), the agreement makes positive provision for the commencement of the tenancy and the rent, and the amount of the latter.]

COCKBURN C. J. I am of opinion that this rule must be discharged. In order to ascertain the intention of the parties, we must look at the whole instrument; and we must see what has been done under it. The agreement before us contemplated two things: one, that a lease, containing certain specified covenants and conditions, should thereafter be executed; the other, that, in the meantime, the tenant should be let into possession,

(a) 2 *Taunt.* 147.

(b) 5 *B. & Ald.* 322.

(c) 6 *Bing.* 206.

and enjoy the premises upon the same terms as those to be contained in that lease. The question arises, upon this, whether such an arrangement creates an immediate tenancy, and, if so, such a tenancy as to give the landlord a right of distress. I have no doubt that an immediate tenancy at will was created, either by the terms of the agreement, or else under sect. 1 of The Statute of Frauds^(a), assuming Mr. *Dowdeswell's* argument that the agreement was void at law by reason of stat. 8 & 9 *Vict. c. 106.*, as not being under seal, to be well founded. The tenancy thus created was, by the words of the agreement, at a fixed and ascertained rent, commencing at an ascertained date: and, that being so, it follows that the landlord had a right to distrain. The cases which Mr. *Dowdeswell* has cited are distinguishable, on the ground that the agreements for leases, there in question, unlike the present agreement, made no provision for the status of the parties to them during the interval before the leases were executed.

WIGHTMAN J. I am of the same opinion. Stat. 11 *G. 2. c. 19. s. 1.* gives a landlord the right to follow and seize goods fraudulently and clandestinely removed by a tenant to prevent their being distrained for rent, in all cases where the tenant has become such by a demise or holding upon which any rent is reserved, due, or made payable. Here, the parties agreed that the tenant should

(a) Stat. 29 *Car. 2. c. 3.*, enacting, by sect. 1, "That" "all leases," "or terms of years, or any uncertain interest of, in, to or out of any messuages," "lands, tenements or hereditaments, made and created" "by parol, and not put in writing and signed by the parties," "shall have the force and effect of leases or estates at will only."

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1861. have a formal lease under seal, but that he should in the meantime hold upon the same terms that were to be contained in the lease: and, consequently, that he should pay the fixed rent which was to be reserved by the lease. The plaintiff was, therefore, tenant at a fixed rent to Mrs. *Marsden*, and she was entitled to avail herself of the provisions of the statute. I agree with the Lord Chief Justice as to the distinction which exists between the present case and those cited by Mr. *Dowdeswell*.

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HILL J. I also think that this rule should be discharged. The agreement was primarily framed with a view to a lease for three years, to be afterwards drawn up. But the parties stipulate, further, that until that lease is granted its terms shall be binding on both of them. Thereupon, the plaintiff entered into occupation of the premises. Now, when a party to an agreement for a lease enters into possession before the lease is executed, he becomes in the first instance a tenant at will, and the other party has no right to distrain until either the tenant has paid rent, or the precise amount of the rent which he is to pay has been agreed upon. *Littledale J.* says, in *Hamerton v. Stead* (a), "Where parties enter under a mere agreement for a future lease they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract. But if no rent is paid, still before the execution of a lease the relation of landlord and tenant exists, the parties having entered

(a) 3 B. & C. 478. 483.

with a view to a lease and not a purchase." And *Saunders v. Musgrave* (a) shews that an agreement that a fixed rent shall be paid has the same effect, in giving the landlord a right to distrain, as actual payment of rent.

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v.
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Company.

Rule discharged.

(a) 6 B. & C. 524.

SINDEN and others *against* BANKS.

Wednesday,
February 6th.
Friday,
February 8th.

DECLARATION, containing common money counts, by trustees of a friendly society, being a society entitled to enjoy all the exemptions and privileges conferred on friendly societies by stat. 18 & 19 *Vict. c. 63*, The Friendly Societies Act, 10 *G. 4. c. 56*, enacts, by sect. 27, "that provision shall be made by one or more of the rules of

every such society," "specifying whether a reference of every matter in dispute between any such society, or any person acting under them, and any individual member thereof, or person claiming on account of any member, shall be made to" "justices of the peace" "or to arbitrators." The subsequent Act, 18 & 19 *Vict. c. 63*, which by sect. 1 repeals the former, "save and except as to any offences committed, or penalties or liabilities incurred, or bond or security given, or proceedings taken under the same, before the commencement of" the repealing Act, by sect. 40 enacts, that "every dispute between any member or members of any society established under this Act or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal."

The rules of a friendly society formed under stat. 10 *G. 4. c. 56*. provided that if any dispute should arise as to the legality or payment of any fine, money, or allowance, or as to the disqualification of any member at the time of his admission, or between any officer and member, it should be referred to the decision of the committee of the society, from whom there should be an appeal to justices.

Before July, 1855, when stat. 18 & 19 *Vict. c. 63*. came into operation, defendant, the treasurer of this society, received, as such, certain moneys, the balance of which he failed to pay over to plaintiffs, the society's trustees, and to recover which plaintiffs after that date brought this action.

Held that, whether the case was governed by stat. 10 *G. 4. c. 56*. or by stat. 18 & 19 *Vict. c. 63*., the action lay: for that the plaintiffs' claim was not a dispute between the society and the defendant in his capacity as an individual member of it, which disputes alone were required by either statute to be dealt with under the society's rules, and otherwise than by action.

Held, by *Hill J.*, that stat. 18 & 19 *Vict. c. 63*. governed the case.

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entitled "An Act to consolidate and amend the law relating to friendly societies."

Plea. That, before and at the time of the commencement of this suit, the claim now made in the declaration was made by plaintiffs, as such trustees as aforesaid, on defendant as a member of the said society, and was a matter in dispute between defendant as such member and plaintiffs as such trustees as aforesaid, which was, at the said times aforesaid, and is by the rules of the said society directed to be decided otherwise than by action at law, to wit, by justices of the peace. That the said society was, at the time of the passing of the said statute in the declaration mentioned, a subsisting society, which had been theretofore formed and established under the Acts thereby repealed, and the rules of which had been and were confirmed, registered and certified under the said repealed Acts, before the passing of the statute in the declaration mentioned; and which said rules of the said society were in force before and at the times of the existence of the said dispute and claims, and at the commencement of this suit, and still are in force and binding upon plaintiffs as such trustees as aforesaid, and on defendant as such member of the said society as aforesaid, by virtue of the statute in such case made and provided.

Replication. That the claim in the declaration mentioned accrued after the passing and coming into operation of stat. 18 & 19 *Vict.* c. 63., entitled "An Act to consolidate and amend the law relating to friendly societies." That the said society, before and at the time when the said claim accrued, was a society established to enjoy and enjoying all the privileges and exemptions by the said Act conferred on societies to be established

thereunder; and that the sections of the said Act in the 11th section thereof specially enumerated extended and were applicable to the said society, and the said claim was and is a claim against defendant as treasurer of the said society, for a balance appearing to be due from him upon the account last rendered by him as and whilst he was such treasurer, and for money since then received by him on account of the said society whilst he was, and as, such treasurer thereof, and not otherwise. General averment of performance of all conditions precedent.

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Rejoinder. That the said account rendered by defendant as such treasurer as aforesaid was not rendered or audited after the passing or coming into operation of the said Act to consolidate and amend the law relating to friendly societies, in the replication mentioned. Issue thereon.

At the trial, before *Blackburn J.*, at the *Sussex* Summer Assizes, 1860, it appeared that the defendant had been for many years treasurer of the friendly society of which the plaintiffs were the trustees; which was formed under stat. 10 G. 4. c. 56., and the rules of which, so far as they are material, will be found referred to in the argument. The defendant resigned his office in *April*, 1856. The present action was commenced to recover from him the sum of 30*l.*, the balance of moneys received by him as treasurer. This sum was received by him in *May*, 1853. The trustees failing to procure payment of this amount by the defendant, his name was struck out of the books of the society, and remained so until 17th *November*, 1859, when he complained to justices, who ordered him to be reinstated. Proceedings were then taken against him in the County Court,

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but the plaint was subsequently removed by certiorari into this Court. The jury returned a verdict for the plaintiffs, and the learned Judge gave the defendant leave to move to set it aside and enter a verdict for him instead.

J. Brown had obtained a rule to that effect.

Denman now shewed cause. There is nothing in either of the Acts relating to friendly societies to debar the plaintiffs from maintaining this action. The last Act is stat. 21 & 22 *Vict. c. 101.*, sect. 5 of which repeals the proviso in stat. 18 & 19 *Vict. c. 63. s. 40.*, but does not affect the question, which depends upon the first clause in that section; whereby it is enacted that "Every dispute between any member or members of any society established under this Act or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal." In the present case the rules of the society direct that disputes between the society and its members are to be decided by the committee of the society, with an appeal from them to justices. The plaintiffs' claim, however, is not such a dispute; the rule and enactment applying only to disputes between members of the society, as such, during their membership, and the trustees or officers of the society. Here, the claim made upon the defendant by the plaintiffs was not made upon him as a member of the society; and was, moreover, made after

he had ceased to be a member. Nor does the case fall within the provisions of sect. 24, which enacts that an officer of the society guilty of fraud in withholding moneys may be brought before justices and made to repay them: for no imputation of fraud was made upon the defendant at the trial. Sect. 1 repeals stat. 10 *G.* 4. c. 56., under which this society was formed; but with a saving of any offences committed, or penalties or liabilities incurred, under that Act, before the commencement of stat. 18 & 19 *Vict.* c. 63.; *i.e.*, before 23rd *July*, 1855. Sect. 2 enacts that, notwithstanding such repeal, “every friendly society now subsisting, which heretofore had been formed and established under the” former Act, “shall still be deemed to be and shall continue to be a subsisting society, as fully as if this Act had not been made:” whilst, by sect. 3, the rules of such societies are to continue in force until altered or rescinded. The rules of the present society, here material, are the 29th and the 32nd. The 29th provides that “If any dispute shall arise as to the legality or payment of any fine, money, or allowance, or as to the disqualification of any member at the time of his admission, or between any officer and member,” the matter shall be referred to the decision of the committee of the society, from whom there may be an appeal to justices. By rule 32, “The treasurer, trustees, or any other officer of the society, shall not be liable to make good any deficiency which may arise in the funds of the society, unless such persons shall have declared by writing under their hands, deposited and registered in like manner with the rules of the society, that they are willing so to be answerable:”—“provided that the trustees, treasurer and every other officer of the society shall be personally responsible and liable for

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all moneys actually received by them on account of or to and for the use of the society." This rule is almost verbatim the same with stat. 10 *G. 4. c. 56. s. 22*. The defendant is therefore personally liable for the balance remaining in his hands as treasurer of the society. And he is liable to be sued for it, inasmuch as rule 29 does not apply to the case, which is therefore not within the arbitration clause, sect. 27, of stat. 10 *G. 4. c. 56.*, enacting, "That provision shall be made by one or more of the rules of every such society" "specifying whether a reference of every matter in dispute between any such society, or any person acting under them, and any individual member thereof, or person claiming on account of any member, shall be made to" "justices of the peace" "for the county in which such society may be formed, or to arbitrators." The authorities shew that such a clause takes away the right of action, and makes an arbitration imperative, only in cases of dispute between a society and some member of it, as such; *Crisp v. Bunbury* (a), *Morrison v. Glover* (b), *Doe d. Morrison v. Glover* (c), *Cutbill v. Kingdom* (d), *Reeves v. White* (e). [*Hill J.* It seems to me that there can be no right of action against the treasurer whilst rightfully holding: but that as soon as he, by his own wrongful act, terminates his rightful holding, an action will lie.] Yes: and the action is not against him as a member of the society; but, even if it is, he is liable to it by reason of rule 32 and of stat. 10 *G. 4. c. 56. s. 22*. [*Hill J.* Sect. 27 certainly appears to be restricted to disputes between a society and its members as such.]

(a) 8 *Bing.* 394.(b) 4 *Exch.* 430.(c) 15 *Q. B.* 103.(d) 1 *Exch.* 494.(e) 17 *Q. B.* 995.

J. Brown and Archibald, contra. The case is governed by stat. 10 *G.* 4. *c.* 56. by reason of stat. 18 & 19 *Vict.* *c.* 63. *s.* 1., inasmuch as the present claim was a subsisting claim at the time that the later Act passed. Whether, however, the case is governed by stat. 10 *G.* 4. *c.* 56. *s.* 27. or stat. 18 & 19 *Vict.* *c.* 63. *s.* 40. is really immaterial: for there is no substantial difference between the two enactments. In either view, the plaintiffs' claim is one which the Legislature has directed to be submitted to arbitration instead of being made the ground of an action. The dispute is one between the society and the defendant as a member. By rule 31 the treasurer is required to be a member; and rules 26 and 35 shew that his duties do not cease with his retirement from office, it being his duty to pay over the balance then remaining in his hands. That duty is imposed upon him as a member of the society; and a dispute relating to his liability to pay over the balance is a dispute between the society and him as a member. The society might have taken proceedings before justices under stat. 18 & 19 *Vict.* *c.* 63. *s.* 24., if they could have made out a case of fraud against the defendant; but, failing that, their only remedy was by arbitration. Stat. 10 *G.* 4. *c.* 56. *s.* 22., which enacts that the treasurer of a society shall be personally responsible and liable for all moneys actually received by him, does not provide that he shall be liable to an action or responsible in any other manner than is pointed out elsewhere in that Act. Stat. 18 & 19 *Vict.* *c.* 63. *s.* 22., which enacts that if the treasurer fails within seven days after a formal requisition to render a true account of all moneys received and of the balance in hand, and to hand over such balance, he may be sued by the trustees of the

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society, tends strongly to shew that under no other circumstances can he be so sued. The cases cited on the other side do not affect the present question. [Hill J. A dispute between a society and its treasurer as to moneys received by him stands on a very different footing from a dispute between the society and an ordinary member as such. The Legislature may well have intended to guard individual members against expensive litigation; and yet not to take away the remedy by action against a treasurer withholding the common funds. I observe that stat. 18 & 19 *Vict.* c. 63. s. 22. provides that, in the action against the treasurer there sanctioned, the trustees are to be entitled to recover their full costs of suit as between attorney and client.]

(COCKBURN C. J. and WIGHTMAN J. were absent.)

CROMPTON J. I am of opinion that this rule must be discharged. The question really turns upon the construction of the two enactments which have been chiefly referred to; stats. 10 *G.* 4. c. 56. s. 27. and 18 & 19 *Vict.* c. 63. s. 40. Decided cases must be taken to have established that, if a statute relating to such a society as the present enacts that disputes between the society and its members shall be determined in the manner directed by the rules of the society, and if those rules direct such disputes to be referred to arbitration, the remedy by action in respect to such disputes is taken away. The question therefore is, whether the present dispute is one within the meaning of either of the statutes before mentioned. Now stat. 10 *G.* 4. c. 56. s. 27. speaks of disputes between "any

such society, or any person acting under them, and any individual member thereof, or person claiming on account of any member." These words appear to draw a distinction between the society and its officers on the one hand, and its individual members on the other. I think that we should be straining their meaning if we held that the description "individual member" and "member" includes the treasurer. The Act contains very strong provisions directed at frauds by officers of a society, the treasurer amongst others; and I think that the remedies against such officers thereby given were intended to be cumulative, and to afford more prompt redress in cases of fraud than could be obtained by an action; not that they were to be substituted for the common law remedy by action; certainly not, at all events, in a case where no fraud is imputed to the defendant. Sect. 25 empowers justices to fine or imprison both officers and members of a society guilty of certain specified frauds; clearly shewing that sect. 27 does not exhaustively provide for all cases of dispute between the society and its members. Sect. 25 also contains a proviso that nothing therein contained shall prevent the society from proceeding by indictment or complaint against the party complained of; and does not, in my opinion, debar the society from a cumulative remedy by action at common law also. Sect. 22 renders the treasurer personally liable and responsible for all moneys which he has actually received, and contains no limitation of his responsibility at common law. Similar remarks apply to stat. 18 & 19 *Vict. c. 63. s. 40.*, the language of which, if anything, still more clearly than that of the previous Act, refers only to disputes between the society and its members as such, and as distinct from

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the society's officers. [The learned Judge read the section.] Sect. 24 is analogous to sect. 25 of the earlier Act, and sect. 20 to sect. 22 of the earlier Act. Mr. *Archibald* has relied upon sect. 22 of the later Act as specifying the only case in which an action will lie against the treasurer; but I cannot see that that section takes away the right to sue the treasurer in any other state of things. It lays down the mode of proceeding where the society wish to obtain an account from the treasurer; but when, as here, no account is wanted, and it is clear that the treasurer has an ascertained amount in hand which he will not pay over, there is no reason why the remedy by action may not also be pursued against him. I am therefore of opinion that the defendant is liable to this action.

HILL J. I am of the same opinion. The first question which arises is, whether we are to decide the case under stat. 10 *G. 4. c. 56.*, or under stat. 18 & 19 *Vict. c. 63.* The latter statute passed in *July, 1855*, and by sect. 1 repealed the former, "save and except as to any offences committed, or penalties or liabilities incurred, or bond or security given, or proceedings taken, under the same, before the commencement of" that "Act." It is now suggested that, inasmuch as the present claim was subsisting at the time the later Act passed, it is saved from the operation of that Act. But I think that "liabilities," in stat. 18 & 19 *Vict. c. 63. s. 1.*, must be read in conjunction with "under the same;" and that the defendant's liability did not arise under stat. 10 *G. 4. c. 56.* We must therefore look to stat. 18 & 19 *Vict. c. 63.* as governing the case; though, after all, the distinction between the two Acts, which are in *pari materiâ*,

is very slight. I am of opinion that this dispute does not fall within the purview either of stat. 10 *G. 4. c. 56. s. 27.* or of stat. 18 & 19 *Vict. c. 63. s. 40.* The main object of both statutes is to protect the property and the interests of the members of these societies by preventing the expenditure of their funds in needless and expensive litigation; to provide a cheap and summary tribunal for the settlement of disputes between the members; and to extend the remedies before existing against those who wrongfully keep possession of the common property; even so far as to enable the societies to reach moneys in the hands of their officers who become bankrupt or insolvent. I think that we should strain the language of the Legislature far beyond its natural meaning, if we held that the claim of a society upon its treasurer for misappropriating and keeping in his hands the moneys of the society, is a dispute between the society and one of its members, within the meaning of either enactment. I think, moreover, that the statutes evince an intention to give cumulative remedies against a treasurer, and not to prevent the society from availing itself of the common law remedy by action against him. For these reasons, and for those which have been given by my Brother *Crompton*, I think that the plaintiffs are entitled to our judgment, and that the rule must be discharged.

Rule discharged.

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Monday,
February 11th.

The QUEEN *against* BRADLEY.

Stat. 7 W. 4
& 1 Vict. c. 78.
s. 14. enacts
that aldermen
shall be elected
in boroughs
by the per-
sonal delivery
to the mayor
or chairman,
at the meeting
for the elec-
tion, by each
councillor
entitled to
vote, of a
voting paper
containing,
inter alia, the
christian
name and
surname of
the persons
for whom he
votes.

Held, that
the statute is
satisfied if the
voting paper
contains a
contraction of
a christian
name which is
well known
and in ordi-
nary use as
representing
that name:
and that, in
such a case,
the name need
not be written
in full. That,
therefore, the
contractions

"Wm." and "Willm." may be used in a voting paper as equivalent to "William."

INFORMATION in the nature of a quo warranto, stating that the borough of *Sheffield*, in the county of *York*, was a borough duly incorporated by royal charter. That within the said borough, pursuant to the said charter, there hath been, and still of right ought to be, one mayor, divers, to wit fourteen, aldermen, and divers, to wit forty-two, councillors, to be elected in the manner in the said charter specified. That *William Bradley*, of the borough aforesaid, brewer, on the 9th *November* last past, at the borough aforesaid, did use and exercise, and from thence continually afterwards to the time of exhibiting this information hath there used and exercised, and doth there use and exercise, without any legal warrant, royal grant, or right whatsoever, the office of alderman of the said borough.

Plea by defendant that, under and by virtue of the said charter, and of stat. 5 & 6 W. 4. c. 76., intituled "An Act to provide for the regulation of municipal corporations in *England* and *Wales*," one-half of the whole number of aldermen of the said borough, to wit seven of the said aldermen, were, upon 9th *November*, 1844, and in every third succeeding year, to go out of office, according to the provisions of the said charter and of the said Act. That, on 9th *November*, 1859, one half of the

whole number of the said aldermen who had been aldermen of the said borough went out of office. That he, the said *William Bradley*, was then an enrolled burgess and a councillor, and was duly qualified to be elected an alderman of the said borough. That, on the same 9th *November*, 1859, he was duly elected by the council of the said borough to be an alderman of the said borough, to supply the place of one of the said aldermen who so went out of office as aforesaid, according to the provisions of the said Act; and that he accepted the said office of alderman.

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Replication: That the said *William Bradley* was not duly elected by the council of the said borough to supply the place of one of the said aldermen. Issue thereon.

At the trial, before *Martin B.*, at the *Yorkshire Summer Assizes*, 1860, it appeared that the councillors who voted at the election did so by means of voting papers. These voting papers were handed in, closed, by the voting councillors, and were opened and read by the mayor, who declared six of the candidates, other than the defendant, duly elected, and that there were an equal number of votes for the defendant and one Mr. *John Carr*. The mayor thereupon gave his casting vote in favour of the defendant, and declared him to have been duly elected an alderman, together with the six others. The voting papers in favour of the defendant were produced at the trial, and from them it appeared that one *Elliott*, a voter, had written "*Wm. Bradley*" in the column headed "The christian name and surname of the persons for whom I vote": and that three other voters, *Jones*, *Stainforth* and *Unwin*, had written respectively in the same column "*Willm. Bradley*." It was

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objected thereupon, on behalf of the Crown, that the voting papers so filled up were insufficient. The learned Judge, however, overruled the objection, and the jury returned a verdict for the defendant.

Overend, in last *Michaelmas* Term, had obtained a rule, calling upon the defendant to shew cause why the verdict should not be set aside and a new trial had, on the ground that the learned Judge ought to have decided, and so directed the jury, that the votes in question for the defendant, not specifying his christian and surname as well as his place of residence and description, were bad (a).

Manisty now shewed cause. The voting papers objected to sufficiently specified the defendant's christian and surname. The election of aldermen in boroughs is regulated by stat. 7 W. 4 & 1 Vict. c. 78. (b) s. 14., which enacts that "Every member of the council entitled to vote in that election may vote for any number of persons, not exceeding the number of aldermen then to be chosen, by personally delivering at such meeting, to the mayor or chairman of the meeting, a voting paper containing the christian name and surname of the persons for whom he votes, with their respective places of abode and descriptions, such paper being previously signed with the name of the member of council voting; and the mayor or chairman of the meeting, as soon as all the voting papers shall have been delivered to him, shall openly produce and read the same, and immediately

(a) The rule was granted also upon other grounds, which were discussed in the argument, but are not thought to require a report.

(b) General, public. "To amend" stat. 5 & 6 W. 4. c. 76.

afterwards deliver them to the town clerk, to be kept among the records of the borough ; and in case of equality of votes among those entitled to vote the mayor or chairman shall have a casting vote, whether or not he may be entitled to vote in the first instance." No doubt, voting papers which do not contain an accurate description of the place of abode of the party voted for are bad : *Regina v. Deighton* (a), *Regina v. Coward* (b). But, assuming it to be equally necessary for a voting paper to contain the true christian and surname of the candidate, in the present case the contractions of the name "*William*" adopted by the voters are in common use and equivalent to the name in full. In *Regina v. Mayor of Hartlepool* (c) a signature by the initials of the claimant's christian names to a claim to be inserted in the burgess list of a borough was held sufficient ; it appearing that there was no other person in the borough of the same name as the claimant, and that his person and handwriting were well known to the court of revision. [Crompton J. In the present case you have this further fact in your favour, that the voters, being required to deliver the voting papers personally, can explain any ambiguity in the names filled in.] Moreover, stat. 5 & 6 W. 4. c. 76. s. 142. enacts that " No misnomer or inaccurate description of any person, body corporate, or place named in " "any roll, list, notice or voting paper required by this Act, shall hinder the full operation of this Act with respect to such person, body corporate, or place, provided that the description of such person, body corporate, or place be such as to be commonly understood." (He was then stopped.)

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(a) 5 Q. B. 896.

(b) 16 Q. B. 819.

(c) 21 L. J. N. S. Q. B. 71. (*Bail Court*.)

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Overend and Quain, contra. The voting papers are bad, as not complying with the requirement of the statute, that they shall contain the christian name and surname of the person voted for; by which must be meant the names in full. In *Regina v. Avery* (a) this Court held that a signature by surname and the initial of a christian name is a sufficient signature of a voting paper by a burgess voting at the election of councillors for a borough, within the requirements of stat. 5 & 6 W. 4. c. 76. s. 32. That section, however, merely requires the signature to be in "the name of the burgess voting"; but it provides, like the enactment now in question, that the voting paper shall contain the christian names and surnames of the persons voted for: thereby shewing, as *Crompton J.* there points out, that greater particularity is required in that instance. That decision tends strongly to shew that the voting papers in the present case were insufficient. The contraction "*Wm.*" may represent many other names besides *William*. [*Wightman J.* It would be for the jury to say whether an ordinary person would not understand it to mean "*William.*"] Contractions of names stand on the same footing as initials. In *Esdaile v. Maclean* (b) it was held that it is informal to describe, in pleading, any of the parties to a bill or note by the initials only of their christian names, without shewing that they were so described in the instrument itself, notwithstanding stat. 3 & 4 W. 4. c. 42. s. 12., which authorizes the use of initials in pleading in such cases. The omission of the christian names of persons mentioned in pleading was formerly ground of special demurrer; *Nash v. Calder* (c).

(a) 18 Q. B. 576.

(b) 15 M. & W. 277.

(c) 5 C. B. 177.

The contraction of a christian name is a different thing from the name itself.

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(COCKBURN C. J. was absent.)

WIGHTMAN J. I am of opinion that the votes objected to on the ground that the voting papers contained abbreviations of the defendant's christian name instead of the name at full length are good. The statute requires each voting paper to contain the christian name and surname of the persons for whom the vote is given. Now, admitting that a mere initial could not be regarded as a christian name, I think that contractions of a christian name which, like those in the present case, are perfectly well known and in ordinary use, are sufficient to satisfy the statute; just as I should be prepared to hold that a misspelling of a christian name, if not such as to occasion any misunderstanding, would not make the voting paper bad. As therefore the votes tendered for the defendant were good, and he had the mayor's casting vote, he was duly elected, and the rule must be discharged.

CROMPTON J. I am of the same opinion. The statute, which appears to have been decided to be imperative, requires that the voting papers shall contain the christian name and surname of the persons for whom the votes are given; together with their respective places of abode and descriptions. I think that this requirement is satisfied, as far as the christian name is concerned, if the voting paper contains something in writing which shews what christian name is intended. As to the present case, although the mere letter *W* might have been open

1861. to the objection that it possibly represented some other
 The QUEEN name than *William*, the contractions "*Wm.*" and
 v. "*Willm.*," though it is just possible that they might refer
 BRADLEY. to some other name, would both be understood by any
 person reading them to mean *William*. Whether the
 question of their meaning be one of law or of fact, the
 defendant is entitled to our judgment.

HILL J. I am of the same opinion. The statute requires as follows.—(His Lordship here read stat. 7 *W. 4 & 1 Vict. c. 78. s. 14.*) Now I think that although an initial cannot be regarded as a christian name, a well known contraction of a name, which cannot be misunderstood, may be so regarded, and is tantamount to the name in full.

Rule discharged.

THE QUEEN, on the prosecution of the Parish-
 ioners of CHRISTCHURCH, ROTHERHITHE, in
 the county of SURREY, against FREDERICK
 PERRY, clerk.

By stat. 1 & 2
W. 4. c. 38.
s. 16., two
 churchwardens

are to be appointed for every church or chapel built under the provisions of that Act; one by the incumbent, and the other by the renters of pews.

The Marriages Act, 6 & 7 *W. 4. c. 85.*, by sect. 26, empowers the Bishop of a diocese, by license under his hand and seal, to authorize the solemnization of marriages in a district chapel, for persons residing within the district. By sect. 32 the Bishop may, with the consent of the Archbishop of the province, revoke this license.

Stat. 6 & 7 *Vict. c. 37. s. 15.* enacts that when any church or chapel shall be built in any district, and consecrated as the church or chapel of such district, the district shall, from and after such consecration, be and be deemed to be a new parish for ecclesiastical purposes. And, by sect. 17, in every such case of a district so becoming a new parish, two churchwardens are to be chosen for it; one by the perpetual curate of the new parish and the other by the resident inhabitants having a similar qualification to that which

MANDAMUS addressed to *Frederick Perry*, clerk,
 minister and incumbent of the church or parish of

Christchurch, Rotherhithe, in the county of *Surrey*.

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"Whereas the parish of *Saint Mary, Rotherhithe*, in our county of *Surrey*, is an ancient parish, and the church thereof, or rectory, within the diocese and subject to the jurisdiction of the Bishop of *Winchester*; And whereas, in the year 1839, the population of the same parish then amounting to more than 2000 persons, and the existing churches and chapels within the same parish not affording accommodation for more than one-third of the inhabitants thereof, for the attendance upon divine service according to the rites of the United Church of *England* and *Ireland*, a certain additional church called and

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would entitle inhabitants to vote at the election of church-wardens for the principal parish.

Stat. 19 & 20
Vict. c. 104.,
by sect. 11,
empowers the
Ecclesiastical
Commissioners, upon
the application

of the incumbent of a district church or chapel, with the written consent of the Bishop of the diocese, to make an order under their seal, authorizing the publication of banns of matrimony and the solemnization therein of marriages, baptisms, churchings, and burials; all the fees for the performance of which offices are to be payable and to be paid to the incumbent. And by sect. 14, wheresoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms, are authorized to be published or performed in any consecrated district church or chapel, such district not being at the time of the passing of that Act (1856) a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is, by such authority, entitled for his own benefit to the entire fees for the performance of such offices, without any reservations thereof, such district shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated by stat. 6 & 7 Vict. c. 37. s. 15.; the church of the district shall be the church of such parish; and all the provisions of stat. 6 & 7 Vict. c. 37., relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if it had become a new parish under the provisions of that Act.

The church of *C.* was built, and had a district assigned to it, under stat. 1 & 2 W. 4. c. 38. In the year 1840 the Bishop of the diocese granted, under stat. 6 & 7 W. 4. c. 85. s. 26., his license for the publication of banns and the solemnization of marriages in the church, and for taking the same fees in respect thereof as were taken in the mother church by the minister and incumbent thereof for the time being; to which the fees for churchings, baptisms and burials were afterwards added. From the consecration of the church down to the issuing of the writ of mandamus in the present case, two churchwardens were chosen for the church in the manner directed by stat. 1 & 2 W. 4. c. 38. s. 16.; one by the incumbent, and the other by the pew renters.

Upon demurrer to the return to a mandamus to the incumbent of the district to convene a meeting of the inhabitants to elect a churchwarden, the return alleging that the incumbent and the pew renters had the privilege of electing the churchwardens, and that stats. 6 & 7 Vict. c. 37. s. 15. and 19 & 20 Vict. c. 104. s. 14. were inapplicable: Held, that the return was good. That the authority contemplated by stat. 19 & 20 Vict. c. 104. s. 14. was not a revocable license by the Bishop, but an authority under an order of the Commissioners under sect. 11 of that Act; and that therefore the district was not brought within the operation of stat. 19 & 20 Vict. c. 104. s. 14.

Semble, that stat. 6 & 7 Vict. c. 37. s. 15. is inapplicable to the case of a district constituted, not under that Act, but under stat. 1 & 2 W. 4. c. 38., with a license by the Bishop under stat. 6 & 7 W. 4. c. 85.

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known by the name of *Christchurch* (the site whereof had been duly conveyed to our Commissioners for building new churches) was erected within the said parish under and by virtue of the provisions contained in stat. 1 & 2 W. 4. c. 38., entitled "An Act to amend and render more effectual an Act passed in the 7th and 8th years of the reign of his late Majesty, entitled 'An Act to amend the Acts for building and promoting the building of additional churches in populous parishes,'" and which said additional church was afterwards (that is to say on or about 23rd June, 1839,) duly consecrated by *Charles Richard*, Lord Bishop of *Winchester*, for the performance of divine service according to the rites of the said United Church of *England* and *Ireland*, the same having been theretofore endowed with a sum of 1000*l.* secured upon money in the funds, in addition to the pew rents and profits intended to be taken and to arise from the same church, and a fund having also been provided for the repairs of the said church to the amount and in the manner required by the said statute, and one third at least of the sittings in the said church having been also set apart and appropriated as free sittings, according to the said statute; And whereas afterwards (that is to say on 7th April, 1840,) the said Lord Bishop of *Winchester*, under and by virtue of the said statute, by a certain indenture by him duly executed under his hand and seal, assigned a separate and distinct district to the said church called *Christchurch*, and caused a description of the boundaries of the said district so assigned to be registered in the episcopal registry of his diocese, such district then forming part of the said parish of *Saint Mary, Rotherhithe*; and in and by the said indenture or deed poll the

said Bishop, under and by virtue of stat. 6 & 7 *W.* 4. c. 85., entitled "An Act for Marriages in *England*," and with the consent of the patrons and of the rector or incumbent of the said church or rectory of the said parish of *Saint Mary, Rotherhithe*, then duly testified under their respective hands and seals, granted his license and authority for the publication of banns of matrimony and the solemnization of marriages in the said church called *Christchurch*, by the minister or incumbent thereof for the time being, of persons residing within the district so assigned to the same church as aforesaid; and he also, and with the like consent, ordered and directed that all such accustomed fees, dues and other emoluments as would have been otherwise paid or payable for or in respect of such banns and marriages to the said rector or incumbent of the said rectory and church of *Saint Mary, Rotherhithe*, aforesaid, should thenceforth be paid and payable to the minister or incumbent of the said church called *Christchurch*; and the said Bishop also then caused his said order and direction as to the several offices to be performed in the said church called *Christchurch* as aforesaid, to be registered in the said episcopal registry of his said diocese; And whereas, by a certain indenture bearing date 6th *April*, 1840, and then made by and between the Reverend *Edward Blick*, clerk, then being the rector or incumbent of the said rectory or church of *Saint Mary, Rotherhithe*, of the first part, the said Lord Bishop of *Winchester* of the second part, the Master, fellows and scholars of *Clare Hall*, in the University of *Cambridge*, the patrons of the said rectory or church of *Saint Mary, Rotherhithe*, of the third part, and the Reverend *John Saunders*, then being the minister and incumbent of the

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1861. said church called *Christchurch*, of the fourth part, and
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their respective hands and seals, reciting, amongst other
things, that the said church called *Christchurch* had been
so erected, and that a district had been so assigned to it
as aforesaid, but that the same church was not intended
to become, under or by virtue of stat. 58 G. 3. c. 45.,
passed for building and promoting the building of addi-
tional churches in populous parishes, the parish church
of a district parish, the said *Edward Blick*, under and by
virtue of the said stat. 1 & 2 W. 4. c. 38. aforesaid, and
by virtue of any other statutes, or of any other powers
by which it was competent for him so to do, and with
the consent of the said Bishop, and of the said Master,
fellows and scholars of *Clare Hall*, respectively, granted
and declared that one equal fourth part of all such
Easter offerings and oblations as should from time to
time become due or payable, or but for the same inden-
ture would become due or payable, to or for the benefit
of the rector or incumbent of the said rectory or church
of *Saint Mary, Rotherhithe*, and also that all fees, dues
and emoluments for or in respect of the churchings,
baptisms, marriages and burials, as had been there-
fore due to or received by the said *Edward Blick*,
as such rector or incumbent as aforesaid, and as
should from time to time thereafter become due or
payable from or by any person or persons whomso-
ever, for or in respect of any services, ceremonials,
or duties, performed in the said church called *Christ-
church*, or in any burial ground belonging thereto,
should be for ever thereafter annexed to the said
church called *Christchurch*, and should from time to
time thereafter be receivable and received by or on

behalf of and for the sole and exclusive use and benefit of the minister and incumbent for the time being of the same church; and the said fees, dues, offerings and emoluments respectively, were by the said Bishop, in and by the said indenture, duly assigned to the said minister and incumbent of the said church called *Christchurch*, who, under and by virtue of the said indenture and of the statute aforesaid, then became and was entitled to the same for his own sole and exclusive use and benefit, without any reservation thereout; and every such minister and incumbent hath ever since been and is thereby so entitled to the same; which said indenture was duly registered in the episcopal registry of the said Bishop; And whereas, by means of the several premises aforesaid, the said church called *Christchurch*, before and at the time of the passing of the Act of Parliament made and passed in the Parliament holden in the 19th and 20th years of our reign (a), entitled "An Act to extend the provisions of an Act of the 6th and 7th years of Her Majesty, for making better provision for the spiritual care of populous parishes, and further to provide for the formation and endowment of separate and distinct parishes," had become and was, within the meaning of the said Act, a consecrated church to which a district belonged, and wherein banns of matrimony and the solemnization of marriages, churchings and baptisms, according to the laws and canons in force in this realm, were authorized to be published and performed, (the district aforesaid not being at the time of the passing of the said Act a separate and distinct parish for ecclesiastical purposes), and the incumbent of which was by such

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(a) Stat. 19 & 20 Vict. c. 104.

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authority entitled for his own benefit to the entire fees arising from the performance of such offices, without any reservation thereout, whereby and by means of the said last mentioned Act of Parliament, immediately after the passing thereof, the said district became and was and now is a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the statute made in the Parliament holden in the 6th and 7th years of our reign (*a*), entitled "An Act to make better provision for the spiritual care of populous parishes," and the said church called *Christchurch*, being the church of the said district, then became and was and now is the church of such parish; And whereas all and singular the provisions of the said last mentioned statute, as then amended, relative to new parishes upon their becoming such, and to the matters and things consequent thereon, became and were and now are, under and by virtue of the said Act of Parliament of the 19th and 20th years of our reign, extended and made applicable to the said new parish of *Christchurch*, and by reason thereof two fit and proper persons duly qualified in that behalf, as required by the said statute so made in the Parliament holden in the 6th and 7th years of our reign, ought in every year to be chosen churchwardens of the same parish, one being chosen by the minister and incumbent of the same parish, and the other by the inhabitants residing therein, and having a similar qualification to that which would entitle inhabitants to vote at the election of churchwardens for the said parish of *St. Mary, Rotherhithe*, and such election ought to take place at the usual period of appointing parish officers at

(*a*) Stat. 6 & 7 *Vict.* c. 37.

a meeting summoned in such manner as the minister and incumbent of the said parish of *Christchurch* shall direct; And whereas we have been given to understand and be informed in our Court before us, that, although one churchwarden for the said parish of *Christchurch, Rotherhithe*, has been duly chosen by you the said *Frederick Perry*, being the minister and incumbent of the same parish as aforesaid, nevertheless no other churchwarden for the same parish has been chosen by the inhabitants residing therein, and having the qualification aforesaid, and that no meeting of such inhabitants, for the purpose of choosing such churchwarden, has been duly summoned by you the said *Frederick Perry*, as such minister and incumbent as aforesaid, according to the said statutes, but that on the contrary thereof you, the said *Frederick Perry*, though requested, as such minister and incumbent as aforesaid, by divers of the said inhabitants to convene and hold such a meeting of the said inhabitants so qualified to vote as aforesaid, for the purpose of choosing such other churchwarden according to the said statutes in that behalf, have wholly neglected and refused, and still do neglect and refuse, so to do, whereby the said parish of *Christchurch, Rotherhithe*, has been and is wrongfully deprived of the benefit of having such other churchwarden, and the inhabitants of the said parish have been and are prevented from choosing a fit and proper person to fill the said office of churchwarden, although the usual period of appointing parish officers, and the proper time for so choosing such a person as aforesaid to fill the said office of churchwarden, has long since elapsed; in contempt of us, and to the great prejudice and injury of the said parish, and of the said inhabitants thereof, as we have

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been informed from complaint made to us; We, therefore, being willing that a fit and speedy remedy be applied in this respect, as it is reasonable, do command you, the said *Frederick Perry*, being such minister and incumbent as aforesaid, firmly enjoining you that, immediately after the receipt of this our writ, you do convene and hold a proper meeting of the inhabitants of the said parish of *Christchurch, Rotherhithe*, duly qualified according to law as aforesaid to vote at the election of churchwardens for the said parish, for the purpose of electing a fit and proper person to serve the office of churchwarden for the said parish of *Christchurch, Rotherhithe*, for the current year or such part thereof as may remain unexpired, so that such person may be then and there duly elected to serve the said office, according to the laws and statutes in that behalf made and provided, or that you shew us cause to the contrary thereof."

Return. That the said church called *Christchurch* had not, at the time of the passing of the said Act of Parliament made and passed in the Parliament holden in the 19th and 20th years of the reign of our said lady the Queen, in the said writ mentioned, become, nor was it within the meaning of the said Act, a consecrated church to which a district belonged, and wherein banns of matrimony and the solemnization of marriages, churchings and baptisms according to the laws and canons in force in this realm, were authorized to be published and performed, or the incumbent of which was by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout; And further, that the said district did not, by means of the said last

mentioned Act of Parliament, become, nor was nor is it by means of the said Act of Parliament, a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the statute made in the Parliament holden in the 6th and 7th years of the reign of our said Lady the Queen in the said writ mentioned. And further that, before and at the time of the passing of the said Act of Parliament made in the Parliament holden in the 19th and 20th years of the reign of our said lady the Queen, the said district of *Christchurch* had and enjoyed, and now has and enjoys, the special right, privilege and liability, that the churchwardens for the church or chapel of *Christchurch* should and shall, at the usual period of appointing parish officers in every year, be chosen, one by the incumbent of the said church or chapel for the time being, and the other by the renters of pews in such church or chapel: and that such special right, privilege and liability was not, nor is the same, taken away, altered, or in anywise affected by the said last mentioned Act, but still exists in full force and effect: and that on 12th *April*, 1860, being the usual period of appointing parish officers, two churchwardens were duly chosen in such manner as aforesaid, one by me the said *Frederick Perry*, and the other by the pew renters of the said church or chapel of *Christchurch*, to act as churchwardens for the same for the then current year, which is not yet elapsed; and that they have since then acted and now act as such churchwardens as aforesaid under such special right, privilege and liability as aforesaid.

Demurrer. Joinder in demurrer.

Badeley, in support of the demurrer. The return is

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bad. The question turns upon stat. 19 & 20 *Vict.* c. 104. s. 14., which enacts that "Wheresoever or as soon as banns of matrimony and the solemnization of marriages, churchings and baptisms according to the laws and canons in force in this realm are authorized to be published and performed in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of" stat. 6 & 7 *Vict.* c. 37., "and the church or chapel of such district shall be the church of such parish, and all and singular the provisions of" stats. 6 & 7 *Vict.* c. 37. and 7 & 8 *Vict.* c. 94., " (as amended by this Act) relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if the same had become a new parish under the provisions of the said last mentioned Acts." The 15th section of stat. 6 & 7 *Vict.* c. 37., therein referred to, enacts that, upon any church or chapel being consecrated as the church or chapel of a district, "such district shall, from and after the consecration of such church or chapel, be and be deemed to be a new parish for ecclesiastical purposes." And the 17th section of the same statute enacts, "That in every such case of a district so becoming a new parish two fit and proper persons" "shall" "be chosen churchwardens for

such new parish, one being chosen by the perpetual curate thereof, and the other by the inhabitants residing therein, and having a similar qualification to that which would entitle inhabitants to vote at the election of churchwardens for the principal parish." Regard being had to these enactments it is evident that so soon as a district church or chapel becomes subject to the operation of stat. 19 & 20 *Vict. c. 104. s. 14.*, churchwardens for the district must be elected by the persons pointed out by stat. 6 & 7 *Vict. c. 37. s. 17.*; which last enactment is but in affirmance of the common law, by which, when a district or place becomes a separate parish, all the common law rights attaching to the parishioners at large attach, so far as the district or place is concerned, to its inhabitants. The two statutes must be read together; and indeed in many respects they supplement each other: for instance, stat. 19 & 20 *Vict. c. 104.*, though in sect. 9 it provides for the appointment of parish clerks and sextons, is silent as to the election of churchwardens; whereas stat. 6 & 7 *Vict. c. 37.* is silent and operative, respectively, in the contrary direction. The question, therefore, is reduced to this, whether the district of *Christchurch, Rotherhithe*, has become subject to the operation of stat. 19 & 20 *Vict. c. 104. s. 14.* And that it has so become appears from the facts that the Bishop of the diocese has granted his license and authority for the publication of banns of matrimony and the solemnization of marriages in the church of the district, and that the incumbent is entitled for his own benefit to the entire fees therefrom. It follows that the privilege alleged in the return, for one of the churchwardens to be elected by the renters of pews, instead of by the inhabitants, cannot be supported,

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1861. being directly opposed to the provisions of stat. 6 & 7
The QUEEN *Vict. c. 37. s. 17.* The other side may rely upon stat.
v. 1 & 2 *W. 4. c. 38. s. 16.*, which enacts "That two fit
PERRY. and proper persons shall be appointed to act as church-
wardens for every church or chapel built or appro-
priated under the provisions of this Act, at the usual
period of appointing parish officers in every year, and
shall be chosen, one by the incumbent of the church or
chapel for the time being, and the other by the renters
of pews in such church or chapel." That Act, however,
ceases to have any application when a district becomes
a separate and distinct parish under the provisions of
the later statutes. Churchwardens elected by pew-
renters would not have the full powers of parish church-
wardens, chosen by the parishioners at large (*a*).

Dr. *Phillimore*, contra, was directed by the Court to
confine his argument to the meaning of the word
"authorized" in stat. 19 & 20 *Vict. c. 104. s. 14.*

The publication of banns and the solemnization of
marriages, &c., in the church of the district of *Christchurch*,
have not been authorized within the meaning of that sec-
tion. No doubt, as stated on the other side, stats. 6 & 7
Vict. c. 37. and 19 & 20 *Vict. c. 104.* are in many respects
to be read together. Now stat. 6 & 7 *Vict. c. 37.* enacts,
by sect. 9, "That if at any time it shall be made to
appear to the" "Ecclesiastical Commissioners for *Eng-
land*, that it would promote the interests of religion that
any part or parts of any" "parish or parishes, chapelry
or chapelries, district or districts, or any extra-parochial
place or places, or any part or parts thereof, should be

(*a*) He made some further points which, as they are not noticed in
the judgment, are here omitted.

constituted a separate district for spiritual purposes, it shall be lawful, by the authority aforesaid, with the consent of the Bishop of the diocese under his hand and seal, to set out by metes and bounds, and constitute a separate district accordingly;" and that every scheme for constituting any such district shall be laid before Her Majesty in council; and the order of council ratifying such scheme is, by sect. 10, to be registered by the registrar of the diocese. By "the authority aforesaid," in sect. 9, must therefore be meant the authority of the Ecclesiastical Commissioners, ratified by an order in council. Then stat. 19 & 20 *Vict. c. 104. s. 11.* enacts that "From and after the commencement of" that "Act, the Commissioners may, if they shall think fit, upon application of the incumbent of any church or chapel to which a district shall belong, with the consent in writing of the Bishop of the diocese, make an order, under their common seal, authorizing the publication of banns of matrimony and the solemnization therein of marriages, baptisms, churchings, and burials, according to the laws and canons now in force in this realm; and all the fees payable for the performance of such offices, as well as all the mortuary and other ecclesiastical fees, dues, oblations, or offerings arising within the limits of such district, shall be payable and be paid to the incumbent of such district." The authorization, therefore, of the publication of banns and the performance of marriages &c., mentioned in sect. 14 of that Act, must mean an authorization by order of the Commissioners under sect. 11; and can have no reference to an authorization by license of the Bishop of the diocese, granted under The Marriage Act, 6 & 7 *W. 4. c. 85.*, sect.

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1861. 26, which license is limited to the solemnization of marriages, and may, by sect. 32, be revoked at any time by writing under the hand and seal of the Bishop, with the consent in writing of the Archbishop of the province. If such a license satisfies the requirements of stat. 19 & 20 *Vict. c. 104. s. 14.*, a district may one day be a separate parish and the next, by reason of a revocation of the license, cease to be so: whereas, if an order of the Ecclesiastical Commissioners is rendered necessary by that section, no such anomaly can result: such an order, once made, being irrevocable.

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Cur. adv. vult.

WIGHTMAN J. now delivered the judgment of the Court (a).

We are of opinion that the defendant is entitled to our judgment upon this demurrer. It is clear that, unless the district of *Christchurch* has become a separate and distinct parish for ecclesiastical purposes, by virtue of the provisions of stat. 19 & 20 *Vict. c. 104.*, the mandamus cannot be supported. And we think that the district of *Christchurch* had not, at the time of passing that Act, the requirements necessary to convert it into a parish of itself, by virtue of that statute. The new church called *Christchurch* was built and endowed, and had a district assigned to it and a fund provided for the repairs of the church, in the years 1839 and 1840, under the provisions of stat. 1 & 2 *W. 4. c. 38.*; and, in 1840, the Bishop, under the provisions of stat. 6 & 7 *W. 4. c. 85.*, granted his license and authority for the publication

(a) *Cockburn C. J., Wightman, Hill and Blackburn J.*

of banns and solemnization of marriages in the new church called *Christchurch*, and for taking the same fees in respect thereof as were taken in the mother church by the minister or incumbent thereof for the time being; to which the fees for churchings, baptisms and burials were afterwards added. The Bishop's license may however, as expressly enacted by the 32nd section of the last mentioned Act, be revoked by the Bishop with consent of the Archbishop; and, by the proviso at the end of the 26th section of the same Act, marriages could only be solemnized in the new district church until the license should be revoked. By the 16th section of stat. 1 & 2 *W. 4. c. 38.*, under which the new district church called *Christchurch* was built and endowed, two churchwardens are to be chosen, one by the incumbent of the new church, the other by the renters of pews in the church. The church and district of *Christchurch* having been thus created under the provisions of stat. 1 & 2 *W. 4. c. 38.*, and publication of banns and solemnization of marriages having been authorized by the Bishop under stat. 6 & 7 *W. 4. c. 85.*, as before mentioned, things remained in the same state, the renters of pews choosing one of the churchwardens, until the present question was raised, and it was said that, immediately after the passing of stat. 19 & 20 *Vict. c. 104.*, the district of *Christchurch* became a separate and distinct parish by the force and operation of stat. 19 & 20 *Vict. c. 104. s. 14.*, by which it is enacted that "wheresoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms according to the law and canons in force in this realm are authorized to be published and performed

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1861. in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereof, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of" stat. 6 & 7 *Vict. c. 37.*; "and all" "the provisions of" that Act "relative to new parishes, upon their becoming such," "shall" "apply to the said parish" "as if" it "had become a new parish under" stat. 6 & 7 *Vict. c. 37.* By the 17th section of the last mentioned Act one of the churchwardens of the new parish is to be elected by the incumbent and the other by the inhabitants. It was said for the prosecution that, the Bishop having authorized the publication of banns and the solemnization of matrimony in the new church called *Christchurch*, the condition required by the 14th section of stat. 19 & 20 *Vict. c. 104.* was fulfilled, and that the district became a distinct parish immediately upon the passing of that Act. We are however of opinion that the authority contemplated and intended by that section of the Act was not a revocable license by the Bishop, but an authority under an order of the Commissioners under the 11th section of the Act, which expressly empowers the Commissioners, if they think fit, to authorize the publication of banns and solemnization of matrimony and baptisms, churchings and burials; and all the fees payable for such offices to be paid to the incumbent of the district. This authority, if it had been

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granted by the order of the Commissioners, would be of a permanent and irrevocable character; but it has not been granted, and we are of opinion that the revocable authority or license of the Bishop is not enough to bring this district within the 14th section of stat. 19 & 20 *Vict. c. 104*. We may observe that the 15th section of stat. 6 & 7 *Vict. c. 37*. does not appear to us to be applicable to this case of a district not constituted under that Act but under stat. 1 & 2 *W. 4. c. 38.*, with a license by the Bishop under stat. 6 & 7 *W. 4. c. 85*. Upon the ground, therefore, that the new church called *Christ-church* was not one in which banns of matrimony and the solemnization of marriages, churchings and baptisms were authorized to be published and performed, within the meaning of the 14th section of stat. 19 & 20 *Vict. c. 104.*, we think that the mandamus cannot be maintained, and that the defendant is entitled to succeed upon this demurrer. Another point arose, upon the effect to be given to the 29th section of the Act, upon which we do not think it necessary to give any opinion, as upon the other ground we think that there should be judgment for the defendant.

Judgment for the defendant, with costs.

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Tuesday,
February 12th.

The QUEEN against LEATHAM.

The Corrupt Practices at Elections Act, 15 & 16 Vict. c. 57. s. 8., requires all persons summoned to give evidence before Commissioners appointed to inquire into such practices to attend the Commissioners and answer all questions put by them, and produce all books and documents bearing on the inquiry. "Provided always, that no statement made by any person in answer to any question put by such Commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal."

THIS was an information filed by the *Attorney General* against the defendant: charging him, in the first count, with having, on 26th *April*, 1859, he being then a candidate at the election for a member of Parliament for the borough of *Wakefield*, advanced to one *Thomas Field Gilbert* 2000*l.*, with intent that it should be expended in bribery at the said election, against The Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102. s. 2 (5). There were other counts charging the defendant with separate and distinct acts of bribery.

Plea. Not guilty.

At the trial, before *Martin B.*, at the *Yorkshire* Summer Assizes, 1860, it appeared that the defendant was a candidate at the election for a member of Parliament for the borough of *Wakefield*, which took place on 2nd *May*, 1859. The defendant, through Messrs. *Overend & Gurney*, secretly forwarded to one *Joseph Wainwright*, the solicitor employed by him in the election, a large sum of money for election purposes. A letter, dated 5th *August*, 1859, from the defendant to *Wainwright*, was produced and tendered in evidence for the

Held that, notwithstanding this proviso, a document already in existence before the time at which a witness is examined before the Commissioners, and referred to by him in the course of that examination, is admissible in evidence against him in subsequent proceedings, other than the specified indictment for perjury, if it be otherwise admissible, and be proved by independent evidence aliunde.

Per *Hill J.* Assuming that such a document, if communicated by the witness to the Commissioners under compulsion, is privileged from production in the subsequent proceedings, independent secondary evidence of its contents is then admissible.

prosecution; but objected to on the part of the defendant, as being excluded from evidence by stat. 15 & 16 *Vict. c. 57. ss. 8. 9. (a)*. In order to support the objection, it was shewn that Commissioners had been appointed under that Act, in *August*, 1859, to inquire into the corrupt practices alleged to have taken place at the *Wakefield* election; and that both the defendant and *Wainwright* had been examined by them. The defendant, who was called by the Commissioners before *Wainwright*, when under examination was asked whether he had got the letter which *Wainwright* wrote to him since the petition against the election; and he answered "Yes, at home; it was asking me to state what sums I considered him accountable for; I wrote them all down, and I sent them to him." The Commissioners expressed a wish to see this letter from *Wainwright* to the defendant; and the defendant afterwards handed it to them. *Wainwright* was afterwards called before the Commissioners; and after he had been examined, but during the pendency of the commission, he, in pursuance of a promise made to the Commissioners, sent all the documents which he could find to Mr. *Dew*, their secretary, amongst which was the letter of 5th *August*, 1859, from the defendant to *Wainwright*.

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The learned Judge admitted the letter, which was as follows:—

"Hemsworth Hall, Pontefract.

August 5, 1859.

"Dear Sir,

"In reply to your inquiry I beg to hand you on the other side the sums of money which were advanced by

(a) "Corrupt Practices at Elections Act." See these sections cited in the argument.

1861. myself and friends for election purposes. I shall be
 The QUEEN very glad to see my account settled. We arrived safely
 v. here on *Tuesday*.
 LEATHAM.

I remain,

Yours truly,

"J. Wainwright, Esq."

"W. H. Leatham."

		£.	s.	d.
"1859.				
Jan.	8. To loan on promissory note	500	0	0
April	9. To loan per <i>Overend, Gurney</i>			
	& Co. - - -	1000	0	0
"	20. Ditto ditto -	500	0	0
"	26. Ditto ditto -	1000	0	0
May	2. To cheque on <i>Leatham, Tew</i>			
	& Co. - - -	200	0	0
"	7. Ditto ditto -	500	0	0
July	26. To sums, per election auditor,			
	paid by <i>Leatham, Tew</i>			
	& Co. - - -	461	18	8
		£4161	18	8
July.	To Mr. <i>Wyatt</i> , on account of			
	petition expenses - -	300	0	0
		£4461	18	8."

The letter, from *Wainwright* to the defendant, supposed to be dated 4th *August*, 1859, to which the above letter was an answer, was then called for by the prosecution, who had given the defendant notice to produce it; and, it not being forthcoming, the prosecution, without any objection on the part of the defendant, called *Wainwright*, who stated that the substance of the letter was that "I wished to know if the defendant could tell me what were the amounts he charged me with."

The jury returned a general verdict of Guilty.

Sir *Fitzroy Kelly*, in last *Michaelmas* Term, obtained a rule, calling on the *Attorney General* to shew cause why there should not be a new trial, on the grounds, first, that there was no evidence of a payment to *Gilbert*, to support the first count; secondly, that the contents of the letter from *Wainwright* to the defendant, and the defendant's letter to *Wainwright* in answer, were improperly admitted in evidence.

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Sir *W. Atherton*, Solicitor General, now shewed cause. (He consented, in the outset, to enter a *Nolle prosequi* as to the first count.) As to the second ground on which the rule was obtained, the learned Judge was right in admitting the evidence objected to. First, the letter of 5th *August*, 1859, from the defendant to *Wainwright*, was per se clearly admissible, and there is nothing in the provisions of The Corrupt Practices at Elections Act, 15 & 16 *Vict. c. 57.*, to exclude it from proof. Sect. 8 of that statute enacts that "It shall be lawful for" the "Commissioners, by a summons" "to require the attendance before them" "of any persons whomsoever whose evidence, in the judgment of such Commissioners," "may be material to the subject-matter of the inquiry to be made by" them, "and to require all persons to bring before them such books, papers, deeds, and writings as to such Commissioners" "appear necessary for arriving at the truth of the things to be inquired into by them under this Act; all which persons shall attend such Commissioners, and shall answer all questions put to them by such Commissioners touching the matters to be inquired into by them, and shall produce all books, papers, deeds, and writings required of them, and in their custody or under their control, according to the tenor

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of the summons: Provided always, that no statement made by any person in answer to any question put by such Commissioner(a) shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal. This section excludes from evidence, in proceeding subsequent to the inquiry before the Commissioner, statements, only, made by a witness in answer to the Commissioners' questions: and it is impossible to maintain that the letter in question was such a statement. If it be a statement at all it is not a statement made in answer to a question by the Commissioners. The letter was not produced to the Commissioners during Wainwright's examination, but sent to them afterwards by him; and the fact that it was referred to in the course of the Commissioners' inquiry cannot preclude it from being proved by independent evidence in a subsequent civil proceeding. Secondly, the objection as to the admissibility of evidence of the contents of Wainwright's letter to the defendant ought not to have been open to the defendant on moving for the rule, as it was not taken at the trial; and, if now open to him, is untenable, the letter being referred to in the defendant's answer to it of 5th August, 1859; to explain which reference, in justice to the defendant, was the sole object which the prosecution had in view in adducing the evidence. (He was then stopped by the Court.)

Sir Fitzroy Kelly and Quain, contra. The policy of the Legislature in passing stat. 15 & 16 Vict. c. 57. was to give every facility for the full disclosure of corrupt

(a) *Sic.*

practices committed at elections for members of Parliament, and to protect persons making a full disclosure from all subsequent liability in respect to the matters disclosed. The power given to the Commissioners by sect. 8 to call before them all persons whomsoever whose evidence they may consider material, is very large, and must be taken in connection with sect. 9, which protects every person who has been engaged in any corrupt practice at an election, and who is examined as a witness, and gives evidence touching such corrupt practice before the Commissioners, and who upon such examination makes a true discovery to the best of his knowledge touching all things to which he is so examined, from all penal actions, forfeitures, punishments, disabilities, and incapacities, and all criminal prosecutions, for anything done by him in respect of such corrupt practice; and enacts that no person shall be excused from answering any question put to him by the Commissioners on the ground of any privilege, or on the ground that the answer to such question will tend to criminate him. The spirit, if not the letter of this enactment, is, that a witness who divulges all he knows, whether by means of oral evidence, or by the production of written documents, shall be exempt from having his words or documents afterwards used against him in any proceeding founded upon his alleged corrupt practices. Moreover, the protection accorded, by the proviso to sect. 8, to statements made by witnesses in answer to questions by the Commissioners, extends to documents referred to in, and thereby made part of, such statements. Suppose the defendant had been asked by the Commissioners, "What sums of money, and for what purposes, did you remit to *Wainwright*?" and had answered "I

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1861. remitted him certain moneys for certain purposes stated in a letter which I sent him:" under the first clause of sect. 8 the defendant would be compellable to produce this letter, and it would be most unfair if, after its compulsory production, it could be turned against him. If the Court construe the Act as not privileging documents so produced from being afterwards given in evidence against those producing them, they will hold out an inducement to persons implicated in bribery to destroy all documents tending to criminate them; and thus the object of the Legislature will be in great measure defeated. [*Crompton J.* It may be urged, on the other hand, that, upon your construction of the statute, parties who choose to make any document a part of their statement before the Commissioners, may thereby defeat the ends of justice in any subsequent civil action involving that document.] It is not necessary to go to the length of saying that such a document would not be admissible in any subsequent action; the Act must be taken to refer to any subsequent proceeding only, instituted in respect of corrupt practices at an election, imputed to a witness before the Commissioners.

(WIGHTMAN J. was present during part of the argument, but left before its conclusion.)

CROMPTON J. I am of opinion that this rule should be discharged. I cannot say that I have, from the outset, entertained any doubt as to the plain meaning of this Act of Parliament. It seems to me very clear that the letters in question are not excluded from being given in evidence by anything in the 8th section. On the facts of the case, indeed, it is unnecessary to say what

the construction of that section is, because the one important letter, that of 5th *August*, 1859, from the defendant to *Wainwright*, was not sent to the Commissioners by the defendant at all, but by *Wainwright*, and cannot, possibly, therefore, be regarded as a statement by the defendant to the Commissioners. I think, however, that the true construction plainly is that a document already existing before, and referred to by a witness in the course of, the examination before the Commissioners, is not, if admissible evidence per se, protected from production in subsequent proceedings, upon due proof of it being then given aliunde, by proof of handwriting, and so forth. If the witness chooses to make his statement to the Commissioners in writing, such writing will be privileged; but mere reference in the statement to a pre-existing writing can confer no privilege on the latter. Were we to hold otherwise, we should put a forced construction on the provisions of the Act. The Legislature first empowers the Commissioners to summon before them all persons whose evidence may be material, and to require them to produce all books, papers, deeds and writings bearing on the inquiry; then follows an enactment making it compulsory on all such persons to attend and produce all documents, and answer all questions put to them by the Commissioners; and, lastly, there is a proviso "That no statement made by any person in answer to any question put by such Commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal." Now, as I have said already, it is clear to my mind that this proviso refers to a statement only, or to something which is in the nature of a statement, and does not include documents referred to in a

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statement. Again, I cannot read the words "any proceeding, civil or criminal" as restricted to proceedings taken under the Act. Had it been necessary to decide the point, I should have been prepared to hold that the Legislature meant to protect the witness from having his statements given in evidence against him in any subsequent proceedings whatever, the specified indictment for perjury only excepted. For instance, his statement could not be used against him to prove that he had signed a deed, or had signed, or forged, a bill of exchange. From all further liability in respect of statements made under legislative compulsion I think that the Legislature meant to give, and have rightly given, the witness relief; but I do not see why we should infer that they intended to protect him from having documents used against him, a clue to which is first procured in the course of his examination. It is reasonable to suppose that such an intention, had it existed, would have been plainly expressed; on the other hand, such an enactment would have introduced great inconvenience, giving rise in every case to the necessity for an inquiry, in all subsequent proceedings, as to whether or not the clue which led to them was obtained from something let fall by the defendant when before the Commissioners, and thereby opening as wide a field for investigation as can possibly be conceived. The obvious meaning of the word "statement" in the proviso to the 8th section of the Act is a statement made for the first time before the Commissioners; which statement alone is privileged. In the analogous case of confessions by persons accused of crimes, they cannot be used against such persons if obtained from them under the compulsion of a threat, or the inducement of a promise; but matters to which

such a confession gives a clue may nevertheless be unexceptionally put in evidence. For instance, if stolen goods or a murdered body are or is found in a place indicated by the confession, this fact may be given in evidence. So, also, in my opinion, might a letter be put in evidence against a prisoner, in which he has given an account of the crime laid to his charge, and which he has, in a confession not itself admissible against him, stated will be found in his house. That case is precisely analogous to the present. But I rest my judgment mainly on the ground that, while the statute has plainly said that statements by a witness before the Commissioners shall be protected, it has nowhere said, either expressly or by implication, that documents referred to in such statements shall be likewise protected. I may add that my Brother *Wightman*, so far as he heard the argument, fully agreed in the conclusion at which we have arrived.

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HILL J. I am of the same opinion. The rule before the Court asks for a new trial upon two grounds, the improper admission in evidence of the defendant's letter of the 5th of *August*, and of the contents of the letter to him to which that letter was an answer. Now, if necessary, the rule might be disposed of on very narrow grounds. The letter of the 5th of *August* was not in any way produced before the Commissioners by the defendant; so that it is idle to say that any privilege acquired by the defendant from his examination by them attaches to that letter. It was sent to the Commissioners by *Wainwright*, through whose examination alone its existence was disclosed. Then, as to the admissibility of evidence of the contents of *Wainwright's*

1861. letter to the defendant, to which that of the 5th of
The Queen *August* was an answer, it would be sufficient to say that,
v. according to the Judge's notes of the trial, no objection
Leatham whatever was taken to the question put by the prosecution to *Wainwright* as to its contents, or to the Judge's reception of his answer. And the Solicitor General has stated to-day in Court, that the object of the prosecution in asking the question was that, in fairness to the defendant, it might appear what was the letter to which the defendant's letter of the 5th of *August* referred. Assuming, however, that the objection had been duly taken to the admissibility of secondary evidence of the contents of this letter (which I will call the letter of the 4th of *August*), on the ground that the letter itself had been communicated by the defendant to the Commissioners, in obedience to their command, I should say that the evidence was admissible, even if the letter itself was not; always supposing that the secondary evidence tendered was distinct and independent. It is a well established rule of law that if a document cannot be proved in Court because of the privilege against its production enjoyed by the person in whose possession or custody it is, independent secondary evidence of its contents is admissible. But, further, I do not think that the letter in question would have been privileged from production. The decision of this point turns on the construction of the proviso to the 8th section of the statute. I wish to state my opinion, and the reasons for it, upon this point; though it is unnecessary that I should do so at length, after the full consideration given to the meaning of the Act by my Brother *Crompton*, in whose judgment I fully concur. I may say, however, that I consider it a very fallacious mode of argument to contend that the

Legislature ought to have intended so and so ; and that, because such ought to have been, such was, its intention. The true mode of ascertaining the intention is, to look to the language of the Act, and, having regard to the object for which it was enacted, to construe that language according to its plain grammatical meaning, unless it be directly repugnant to the object stated on the face of the Act. Now the language of the 8th section of the Act before us is as follows. [His Lordship read the section, except the proviso.] Two things are thereby required of the witnesses who attend before the Commissioners: they are to answer all questions put to them touching the inquiry ; and to produce all books, papers and other documents, according to the tenor of the summons. Then follows the proviso "That no statement made by any person in answer to any question put by such Commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal." Plainly and literally construed, this proviso protects a witness in respect of the performance of his first duty only, that, namely, of answering all questions put to him. We are asked to extend its operation to all documents which the witness, in pursuance of the duty secondly imposed upon him, produces according to the tenor of the summons. I think, however, that the Legislature must be taken to have intended to leave all such documents as had an independent existence prior to the statement of the witness before the Commissioners, as unprotected as they were before, even although the witness should, in the course of his statement, refer to them ; and that were we to hold otherwise

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the Act. For these reasons I think that the rule should
be discharged.

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BLACKBURN J. I also think that the rule should be discharged. I will assume as a fact (though I doubt whether it is established by the notes of the Judge who tried the case) that the existence of this letter was first mentioned to the Commissioners by the defendant. But even then the only question is, what does the Act mean? The Legislature, with a view to the full disclosure of the corrupt practices into which the Commissioners are to inquire, enacts that the witnesses who attend before them shall answer all questions and produce all documents bearing on the facts. The Act then protects a witness, who, in any statement in answer to the Commissioners' questions, may have criminated himself, from liability to subsequent proceedings in respect of matters fully and truthfully disclosed by him. The argument for the defendant appears to come to this, that the proviso to the 8th section enacts in effect that if the witness has made any statement to the Commissioners concerning any fact or document, or given the first clue to that fact or document, the fact or document shall not be provable against him in any subsequent proceedings except an indictment for perjury, by independent evidence, however admissible such evidence, but for the statute, would be. Now I quite agree with my Brother *Hill* that we must construe the Act according to its plain words, and I altogether fail to see how those words can warrant any such a conclusion as we are asked to come to. I own, further, that, were it my

province to consider what it would have been wise for the Legislature to have enacted, I should say that an enactment that nothing, the first clue to which was given by a witness under examination by the Commissioners, should be provable against him by evidence aliunde, would have been very unwise; would have encouraged rather than checked the corrupt practices which the Act seeks to put a stop to; and would have introduced excessive practical inconvenience into *nisi prius* inquiries. Such an enactment would have necessitated an investigation, as to every species of evidence tendered in subsequent proceedings against one who had been examined by the Commissioners, into the question whether he had not, when before them, given the first clue to it. Very clear and express language would be necessary to satisfy me that the Legislature had enacted anything of the kind. In the present case such language is altogether wanting, and we are virtually asked to interpolate into the Act words which we do not find there, and which, whether in our opinion judicious or not, we have no power to introduce.

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Rule discharged.

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*Saturday,
February 9th,
Wednesday,
February 13th.*

GOFF against The GREAT NORTHERN Railway Company.

A railway Company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by its authority. Such authority need not be under seal; but it lies upon the

DECLARATION: For that defendants assaulted plaintiff and took him into custody and to a police station, and imprisoned and detained him there without reasonable and probable cause; and took him before a magistrate upon a false and unfounded charge of having committed an offence punishable by law, which charge the said magistrate, on hearing, dismissed.

Plea. Not guilty. Issue thereon.

plaintiff to give evidence justifying the jury in finding that the persons actually imprisoning him, or some of them, had authority from the Company to do so.

The Railways Clauses Act, 1845, 8 *Vict. c. 20.*, by sects. 103, 104, imposes a penalty on any person travelling on a railway without having paid his fare, with intent to avoid payment thereof; and empowers all officers and servants on behalf of the Company to apprehend such person until he can conveniently be taken before a justice.

Held that, inasmuch as the exigency of deciding whether or not a particular passenger shall be arrested by a railway Company's servants under this statute must be naturally expected to arise frequently in the ordinary course of the Company's business, and is of such a nature that the decision must be made promptly on the Company's behalf, it is a reasonable inference that the Company have on the spot, at their stations, officers with authority to make the decision promptly for them.

In an action against a railway Company for the false imprisonment of plaintiff on an unfounded charge under the statute, the evidence for plaintiff shewed that he, having travelled on defendants' line with a return ticket from *L.* to *W.* and back, at the end of the return journey gave up to defendants' ticket collector at the *L.* station the return half of another ticket which had then expired, and which he had put in his pocket by mistake for the right one. The ticket collector thereupon took him to the ticket office, where he explained the mistake. Thence the collector took him to defendants' paid inspector of police at the station, and the collector and inspector thence took him to the office, also at the station, of the superintendent of the line, who, refusing to accept plaintiff's explanation, said to the inspector, "I think you had better take him, but first you had better obtain the concurrence of the secretary." The inspector thereupon left, but returned shortly afterwards (whether or not having obtained the secretary's concurrence did not appear), when he directed a police constable, also in defendants' pay, to take plaintiff before a magistrate on the charge. The constable did so, and the magistrate, plaintiff's story proving true, dismissed the complaint. Held, that the conduct of all defendants' other officers, in referring to the superintendent of the line as the superior authority, was sufficient evidence to go to the jury that he was an officer having authority to act for defendants in arresting plaintiff.

The action was brought by the plaintiff, a builder and carpenter working on his own account, against the defendants for taking him into custody and before a magistrate on a charge of attempting to defraud them.

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The cause was tried before *Blackburn J.*, at the *Surrey Summer Assizes*, 1860, when a verdict was found for the plaintiff, with 50*l.* damages; leave being reserved to the defendants to move to enter a nonsuit if the Court should be of opinion that there was not sufficient evidence upon which the jury could properly find that the defendants were liable for the imprisonment of the plaintiff.

Hawkins had obtained a rule calling upon the plaintiff to shew cause why a nonsuit should not be entered, or why there should not be a new trial on the ground that the damages were excessive.

Montagu Chambers and *Watkin Williams* shewed cause (a).

Hawkins and *J. C. Mathew* supported the rule.

The facts and the arguments are sufficiently disclosed in the judgment of the Court. The following cases, however, in addition to those mentioned in the judgment, were cited in argument; *Great Northern Railway Company v. Harrison* (b), *Maund v. Monmouthshire Canal Company* (c).

Cur. adv. vult.

(a) *Saturday, February 9th*, before *Wightman, Crompton, Hill* and *Blackburn Js.*

(b) 10 *Exch.* 376.

(c) 4 *M. & G.* 452.

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BLACKBURN J. now delivered the judgment of the Court.

This was an action against *The Great Northern Railway Company*, for giving the plaintiff into custody and causing him to be taken before a magistrate on an unfounded charge of travelling in a carriage of the Company without having previously paid his fare, with intent to avoid payment thereof. Plea, Not guilty. On the trial, before me, at the last *Guildford* Assizes, there was no doubt that the plaintiff was in fact imprisoned and taken before the magistrate on the charge, but the counsel for the defendants objected, at the close of the plaintiff's case, that there was no evidence on which the jury could properly find that the defendants, the railway Company, were liable for this imprisonment. I was of opinion that it was a question for the jury, but reserved leave to enter a nonsuit in case the Court should be of opinion that there was not sufficient evidence. No evidence was called for the defendants. The question was left to the jury, who found for the plaintiff. No complaint has been made of the manner in which the question was submitted to the jury, if there was evidence; but a rule was obtained by Mr. *Hawkins* to enter a nonsuit, which has been argued before my Brothers *Wightman*, *Crompton* and *Hill*, and myself.

From the nature of the question it becomes important to state precisely what the evidence at the trial was. The plaintiff was called as a witness on his own behalf. He gave evidence that, on *Saturday*, the 10th of *March*, he, being in *London*, took a second class return ticket by the *Great Northern Railway* to *Wood Green* and back to *London*. This ticket being issued on a *Saturday* was available as a return ticket on the *Monday*

On arriving at home, at *Wood Green*, he gave the chimney piece the half ticket, which was available on *Monday* for his return. His wife's sister had, on *Thursday*, the day he was to visit her sister with a return ticket, placed the half of her ticket in the chimney piece. She had been persuaded that it was the right ticket, and, her half ticket not being available on *Thursday*, she went away leaving it there; the plaintiff on the *Monday* took by mistake his sister in law's half ticket, which would have been available for her on *Thursday*, the 8th of *March* only, supposing it to be his own half ticket available for him on *Monday* the 12th of *March*. On his arrival at *King's Cross* he gave up this, the wrong ticket, supposing it to be his own, the right one. He then proceeded in his evidence to give the following account of what took place. "On arriving at *King's Cross* the collector of tickets took the ticket. He left, and returned with another collector. One of them said, 'You have got a wrong ticket.' I said 'I am not aware of it.' I told him I had got it at ten minutes past 5 (*i. e.* on *Saturday*). He said 'You will take the consequences.' Then the train went on to the platform: there the collector who first came to me accompanied me to the ticket office, where the clerk who issues the tickets sits. The ticket clerk referred to a book, and said 'This ticket was issued on the 8th.' Then it struck me how the mistake had occurred, and I said 'I can account for it: one of my wife's sisters had paid her a visit, and had no doubt left this half-ticket, which I must have taken in mistake.' I then went with the collector to the inspector of police in the station. They called him *Mr. Williams*. I have repeatedly seen him on the plat-

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form giving directions to the police and the other servants of the Company. He immediately said 'I saw this man at the half-past five train on *Saturday*.' I said 'Yes; you were settling a disputed cab fare.' We then went to an office. I think 'Superintendent of the Line' was on the door. I had before given my address, and told him what I supposed was the explanation. The superintendent of the police explained it to the superintendent of the line. I asked them to send to the station-master at *Wood Green*, Mr. *Pickett*, who knew me and my house. They said *Wood Green* was the worst station on the line for transferring tickets, and treated it as if I was telling an untruth. The superintendent of the line said 'I think you had better take him, but first you had better obtain the concurrence of the secretary.' First, he said, 'Will he pay the fare?' I said 'I can't, for I have only sixpence.'" (The fare, it appeared from the other evidence, was sevenpence.) "I had a few tools, which I offered to leave. Then the superintendent of the line said, 'You had better obtain the concurrence of the secretary.' The police inspector then left me. In a few minutes he returned. He said to a man in plain clothes, 'Take this man to *Platt Street* station, and charge him with having travelled in a second class carriage without having paid his fare.'" The plaintiff was accordingly taken to the station, and before a magistrate; the charge was made, and the different railway servants gave evidence. On the investigation it appeared that his story was true, and he was in the result discharged (a). When the plaintiff's

(a) The plaintiff was detained from 10 a.m. till 4 p.m. on the *Monday*, and was remanded by the magistrate on his own recognizance till the next day, when, on producing the right half-ticket, he was discharged.

attorney applied for compensation, a letter was written in answer by the secretary, in which he did not state that the persons apprehending the plaintiff acted on their own responsibility (a). The only other evidence

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(a) The letter of the plaintiff's attorney and the secretary's answer were as follows:—

"Sir,

"30th March, 1860.

"I have been consulted by Mr. Henry Goff, of Wood Green, Tottenham, with reference to the very unjustifiable conduct of yourself and the superintendent of the line on the 12th instant, in having him given in charge and taken to the Clerkenwell Police Court upon an unfounded accusation of travelling in a second class carriage without having previously paid his fare. It appears that in the hurry of leaving his home he had unconsciously taken a return ticket issued to another member of his family on the 8th of March instead of the one issued to himself on the 10th. On finding out his mistake he explained it to the authorities, and requested them to telegraph to the station master at Wood Green, to whom he was known and who also could have ascertained the truth of his assertion; but instead of this course being adopted he was taken into custody and detained nearly six hours, when he was released on his recognizances to appear the next day with the missing ticket, which he accordingly did, and was discharged.

"My client has waited some days to see if the Company would voluntarily make any acknowledgment of their error, and compensation for the injury inflicted; but as he has not received any communication from them he has instructed me to draw your attention to the matter, and to request an answer as to the intention of the Company on the subject.

"I am, Sir,

"Your obedient Servant,

"To the Secretary of The Great
Northern Railway Company, King's Cross."

"Jas. M. Weightman."

"The Great Northern Railway,
Secretary's Office, King's Cross, London.

"Sir,

"31st March, 1860.

"I have your letter of the 30th instant. Any inconvenience Mr. Goff may have suffered on the occasion in question resulted entirely from his own act, and the Company cannot therefore entertain the claim you prefer on his behalf.

"I am, Sir,

"Your faithful Servant,

"J. M. Weightman, Esq."

"Henry Oakley,

"Secretary."

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bearing on the question before us was that of *William Ramsden*, who gave evidence that he was a police constable employed by *The Great Northern Railway Company*. *The Great Northern Railway Company's* police inspector directed him to take the plaintiff, and charge him with travelling without having paid his fare, with intent to avoid paying his fare. This witness said that he was paid by the Company, and so, he believed, was the inspector.

In determining whether there should have been a nonsuit or not, we must say whether, assuming all that was stated to be accurate, it afforded evidence on which the jury might properly find that the imprisonment was the act of some person acting within the scope of an authority conferred on him by the defendants, they being a railway Company. Up to a certain point there is no doubt about the law. A railway Company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by the authority of the Company; and it is not necessary that the authority should be under seal. Both these points were decided by the Court of Exchequer Chamber in *Eastern Counties Railway Company v. Broom (a)*. But it lies upon the plaintiff to give evidence justifying the jury in finding that the persons actually imprisoning him, or some of them, had authority from the Company to do so. In *Eastern Counties Railway Company v. Broom (a)* the Court of Exchequer Chamber were of opinion that what was stated in the bill of exceptions in that case was not sufficient evidence for that purpose; and it has been argued before us that the evidence in

(a) 6 Exch. 314.

the present case goes no further. It has also been argued that, in *Roe v. Birkenhead, Lancashire and Cheshire Junction Railway Company* (a), the Court of Exchequer entered a nonsuit in a case in which the evidence, it is said, was similar to that in the present case; and that these decisions, one in a Court of error and the other in a Court of co-ordinate jurisdiction, are binding upon us. But both of these decisions took place in 1851; and in 1853 the Court of Exchequer Chamber, in *Giles v. Taff Vale Railway Company* (b), stated principles which are also binding upon us; and which, it was said for the plaintiff, and we think correctly, are applicable to the present case. The question there was, whether there was evidence sufficient to prove a conversion of certain quicks belonging to the plaintiff by *The Taff Vale Railway Company*, the defendants in that action. The evidence stated in the bill of exceptions shewed that the quicks had been brought in two parcels to two different stations belonging to the defendants, and that, when demanded from the clerks there, reference was made to one *Fisher*, who was called "The General Superintendent of the Line," and he refused to deliver them up. Nothing was stated in the bill of exceptions to shew what the authority of a "general superintendent" was. There being no doubt that *Fisher* was guilty of a conversion, the question was, whether there was sufficient evidence of his authority from the Company to make them liable. *Jervis C. J.*, *Pollock C. B.*, *Alderson B.*, *Maule J.*, *Platt B.*, *Williams J.* and *Talfourd J.* all agreed that there was sufficient evidence. *Jervis C. J.* put it on a broad and intelligible principle. He said (c) "I am of

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(a) 7 *Exch.* 36.(b) 2 *E. & B.* 822.(c) 2 *E. & B.* 829.

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opinion that it is the duty of the Company, carrying on a business, to leave upon the spot some one with authority to deal on behalf of the Company with all cases arising in the course of their traffic as the exigency of the case may demand: and I think it was a question for the jury, whether *Fisher* in this case was a person having such authority." *Maule* J. puts it on the same ground (a): "There ought to be some one with authority from the Company to deliver up or refuse to deliver up goods. To whom was the plaintiff to apply, except to the station masters and superintendent? And who else was to have that authority?" *Platt* B. uses language still more closely in point on the present case (b): "It is objected that we do not know what a general superintendent is. But might not the jury know? Might not they rightly infer that he was a person having authority generally to superintend the affairs of the Company on the spot, and, in the course of such superintending, to deliver or refuse to deliver goods left with them as carriers? And then we have the conduct of the parties; the plaintiff, when he wants his goods, goes to the persons acting for the Company; and they all refer him to *Fisher* as the superior authority. I think that is sufficient evidence to go the jury." *Parke* B. and *Martin* B., who, though not dissenting, expressed some doubt, did not at all dissent from the doctrine of the rest of the Court that there was ample evidence that *Fisher* had authority to bind the Company in all matters requiring a prompt decision, if those matters arose in the course of the ordinary business of the Company. They doubted whether the facts stated on the bill of exceptions shewed that

(a) 2 E. & B. 833.

(b) 2 E. & B. 834.

the quicks had so come on the Company's station as to make it an exigency, in the course of the ordinary business of the Company, to deliver them up or refuse them.

The question in that case arose as to the evidence of authority to deal with goods, and, the language of the different Judges being with reference to that subject, they speak only of the exigencies of traffic, or of the business of a carrier of goods: but the same principle is, we think, applicable to all exigencies that may be naturally expected to arise in the ordinary course of any of the business of the Company. If these are of such a nature that a decision must be come to on behalf of the Company promptly, the Company may reasonably be expected to authorize some one on the spot to decide for them in such cases. Now, in the present case, the railway Company carry on a business a great part of which consists in carrying passengers for money. By stat. 8 *Vict. c. 20.*, sects. 103, 104, a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to avoid payment thereof; and power is given to all officers and servants on behalf of the Company to apprehend such person until he can conveniently be taken before a justice. In the ordinary course of affairs, the Company must decide whether they will submit to what they believe to be an imposition, or use this summary power for their protection; and as, from the nature of the case, the decision whether a particular passenger shall be arrested or not must be made without delay, and as the case may be not of infrequent occurrence, we think it a reasonable inference that, in the conduct of their business, the Company have on the spot officers with authority to determine, without the

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delay attending on convening the directors, whether the servants of the Company shall, or shall not, on the Company's behalf, apprehend a person accused of this offence. We think that the Company would have a right to blame those officers if they did not, on their behalf, apprehend the person, if it seemed a fit case; and, if so, the Company must be answerable if, in the exercise of their discretion, these officers, on their behalf, apprehend an innocent person. Then, was there evidence that the parties concerned in apprehending the plaintiff, or some one of them, was an officer having such authority from the Company? It is difficult to see why the Company pay the police, if the inspector of their police is not to act for them to this extent: but there is more in this case. We find that the ticket collectors, and the ticket clerk, and the police, and all the persons acting for the Company, go to the office of the superintendent of the line, and refer to him as the superior authority. We agree with *Platt B.*, in *Giles v. Taff Vale Railway Company* (a), that such conduct is sufficient evidence to go to the jury that the superintendent of the line was the person in authority. The evidence does not shew that the concurrence of the secretary was actually obtained; but, if it were, he is but an officer of the same sort of authority as the superintendent of the line. It remains then to see if the two cases relied on by the defendants are so decidedly in point as to prevent our acting upon this evidence. In *Eastern Counties Railway Company v. Broom* (b) the question arose on a bill of exceptions. All that is stated on the bill of exceptions is, that the plaintiff was taken out of a railway carriage and im-

(a) 2 E. & B. 822, 834.

(b) 6 Ersk. 314.

prisoned by the defendant *Richardson*, "then an inspector in the service of the Company, professing to act in so doing as the servant of the Company, and under the assertion by the defendant *Richardson* of the cause of justification set forth in the defendants' several pleas of justification, but which several pleas, except the several bye-laws therein mentioned, were disproved by the evidence." The pleas set forth as a justification that the plaintiff had infringed various bye-laws; that *Richardson* interfered to enforce them; that in revenge the plaintiff assaulted *Richardson*, and for that assault was given into custody. It is not at all clear on this statement what the evidence really was, nor whether it brought the case within the principle afterwards laid down in *Giles v. Taff Vale Railway Company* (a). It is observable that both the argument and the judgment are almost exclusively directed to the question whether there was a justification or not. But, if the decision in *Eastern Counties Railway Company v. Broom* (b) is on a principle inconsistent with that subsequently laid down by the Court of Exchequer Chamber in *Giles v. Taff Vale Railway Company* (a), we consider ourselves free to choose which of the two authorities we shall follow, and we prefer the latest in date, which we think also the soundest in principle. In *Roe v. Birkenhead, Lancashire and Cheshire Junction Railway Company* (c) the facts stated in the report were these. The plaintiff had taken his ticket at a station of the defendants for *Bangor* and back. The dispute as to his fare arose on the other side of *Chester*, and off the defendants' line altogether. The plaintiff was taken at the *Chester* station to a super-

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(a) 2 F. & B. 822.

(b) 6 Exch. 314.

(c) 7 Exch. 36.

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Chester, and there was no evidence to shew to which
Company the superintendent belonged. It seems prob-
able that he would be the superintendent of the line on
which the dispute arose, which was not the defendants'
line. That superintendent gave the plaintiff in custody
to a man called Phillips, and one of the witnesses stated
that he believed Phillips to be one of the servants of the
defendants' Company. On this state of facts the Court
of Exchequer thought there was no evidence that any
person concerned in the arrest was a servant of the
defendants, except Phillips; and that there was no evi-
dence that he had any authority on their behalf to give
passengers into custody. And we agree with them;
but the facts are evidently very different from those in
the present case. We think, therefore, that there is no
ground on which to enter a nonsuit.

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The rule was also moved on the ground that the damages, 50*l.*, were excessive. They were liberal, certainly, and we should have been better pleased if they had been smaller; but we do not think the excess so great as to induce us, in our discretion, to order a new trial on that ground. The rule must therefore be discharged.

Rule discharged.

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STEVENS *against* AUSTEN (a).Thursday,
February 7th.**D**ECARATION for money had and received.

Plea. Never indebted. Issue thereon.

At the trial, before *Blackburn J.*, at the Sussex Summer Assizes, 1860, it appeared that the action was brought to recover the sum of 50*l.*, being the deposit made by the plaintiff with the defendant, an auctioneer and estate agent, upon a contract by the plaintiff with one *Samuel Swift*, the defendant's employer, to purchase in fee of *Swift* a certain freehold messuage and premises

S., being seised in fee of a messuage, and having other real and personal estate, died, having devised all his real and the residue of his personal estate to *W. S.* and *H. S.*, "their heirs, executors and administrators," upon trust that

W. S. and *H. S.*, or the survivor of them, or the heirs, executors, or administrators of such survivor, should sell. The testator further declared that *W. S.* and *H. S.*, or the survivor of them, or the executors or administrators of such survivor, should hold the proceeds of the sale in trust to pay debts and invest all the residue of the trust moneys in government or real securities, and pay the dividends equally between the testator's wife and daughter during their lives, and wholly to the survivor after the decease of one of them; and, after the decease of that survivor, to divide the whole equally amongst all the then living children of the testator, or, failing them, according to the Statute of Distributions. The testator also appointed *W. S.* and *H. S.* his executors. They acted in the trust, and *H. S.*, the survivor, devised all his real and personal trust estates to *A.* and *B.* (whom he also appointed his executors), to hold to them, their heirs, executors, administrators and assigns, upon the same trusts as the testator *H. S.* held them. After the death of *H. S.*, *A.* and *B.* sold the messuage in question to *C.*, who subsequently contracted with plaintiff to sell it to him in fee.

In an action by plaintiff to recover the deposit money paid under this contract, on the ground that *C.* had failed to make out a good title, held (*dubitante Blackburn J.*) that plaintiff was entitled to recover; inasmuch as, by reason of the omission of "assigns" in the description of the donees of the power of sale in the devise by *S.* creating the trust, the title of the devisees of *H. S.* to convey to *C.* was too doubtful for a Court of equity to compel specific performance of the contract.

Quære, per *Blackburn J.*, whether this Court, as a Court of law, was not bound to decide absolutely whether the vendor's title was good or bad.

S. in 1810 bought the messuage in fee for 462*l.* The price paid to *A.* and *B.* by *C.*, upon the sale of it to him in 1855, was only 73*l.* 4*s.*, and the contract price between *C.* and plaintiff, in 1859, was 350*l.*

Held, per totam Curiam, that the inadequacy of the price at which *A.* and *B.* sold constituted a breach of trust; and that, as plaintiff, having notice, was affected thereby, plaintiff was entitled on that ground to refuse to complete the contract.

(a) This case has been unavoidably inserted out of its turn.

1861. situate in the parish of *Wadhurst*, in the county of
Sussex. The contract, which consisted of a written
offer by the plaintiff, accepted by *Swift*, of 350*l*. "for
the property, seven acres more or less, at or near *Sparrow
Green, Wadhurst*," was entered into, and the deposit
was thereupon made by the plaintiff, in *August*, 1859.
Before action, the plaintiff had repudiated the contract,
on the ground of a defect in *Swift*'s title.

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The title in question, so far as is material, was as follows. In 1810, another *Samuel Swift* purchased the premises in fee for 462*l*. By his will, dated 19th *June*, 1823, after bequeathing some small legacies, he devised the said premises and all other his real estate, and the residue of his personal estate, to his two sons, *William Swift* and *Henry Swift*, to hold the same unto the said *W. Swift* and *H. Swift*, "their heirs, executors and administrators", upon trust that they, the said *W. Swift* and *H. Swift*, or the survivor of them, or the heirs, executors or administrators of such survivor, should, at such time or times as might be considered prudent after the testator's decease, sell and dispose of his said real estate, and also such part of the residue of his said personal estate as should be of a saleable nature, either by public auction or private contract, to such person or persons and for such price or prices as the said *W. Swift* and *H. Swift*, or the survivor of them, his heirs, executors or administrators, should in their or his discretion think proper. And should, upon payment of the purchase money or purchase moneys for which the said hereditaments and real estate, or any part thereof, should be so sold, convey, surrender and assure the same to the purchaser or purchasers thereof, his, her or their heirs or assigns, or as he, she or they should

direct; and should give one or more receipt or receipts for the said purchase money or purchase moneys; which receipt or receipts should effectually discharge the purchaser or purchasers from payment of such and so much money as in such receipt or receipts should be expressed or acknowledged to have been received. And the testator ordered, directed and declared that the said *W. Swift* and *H. Swift*, or the survivor of them, or the executors or administrators of such survivor, should stand possessed of the money to arise by the sale and conversion of his said real and personal estate, upon trust to pay the testator's debts and to invest all the residue of the trust moneys in government or real securities, and to pay the dividends, equally, to the testator's wife and daughter during their joint lives; and after the decease of either of them to pay the whole of such dividends to the survivor; and after the decease of such survivor to call in and divide the principal moneys equally amongst all and every the testator's child or children then living; and, if all such children were then dead, to divide the said principal moneys amongst the testator's next of kin according to the Statute of Distributions. The testator appointed his said trustees his executors. He died in 1824, leaving both real and personal estate. His will was duly proved by the said executors, of whom *Henry Swift* became acting trustee, always receiving the rents of the real property and dealing with the trust funds. *Henry Swift* survived his co-executor, *William Swift*, and, by his last will, dated 15th *February*, 1853, he devised to *James Harmer* and *John Swift* all and singular the real and personal estate whatsoever whereof he should be seised or possessed at the time of his death as a trustee for any person or

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persons whatsoever; to hold the same unto the said *J. Harmer* and *J. Swift*, their heirs, executors, administrators and assigns, according to the nature of the several estates respectively, upon the same trusts as the testator held the same respectively. He also appointed them his executors. He died in 1854, and his executors, *J. Harmer* and *J. Swift*, in *March*, 1855, conveyed the messuage and premises in question to *Samuel Swift*, the plaintiff's vendor, in fee. The purchase money paid by *Swift* was only 73*l.* 4*s.*; but he, in the same month of *March*, 1855, raised a sum of 50*l.* on a mortgage of the premises, and a further sum of 50*l.* in *February*, 1857.

The following are extracts from the correspondence which took place between Mr. *Patten*, the plaintiff's solicitor, and Messrs. *Cripps* and *Clarkson*, the vendor's solicitors, with reference to the exceptions taken by the former to the title.

“4th *April*, 1860.

“Dear Sirs, “*Swift* and *Stevens*.

“From a perusal of the abstract and inspection of the deeds comprised in it, it is impossible not to form an opinion that Mr. *Samuel Swift*, the vendor, gave a very inadequate price for the property he has contracted to sell to Mr. *Stevens*. The sale to him is so recent, and the property is shewn to have been, both before and after the sale, of so much greater value than the price given for it, that the purchaser is necessarily put upon inquiry. I beg therefore to know whether you can give any explanation of the circumstances under which the sale to Mr. *Swift* was made. Irrespective of this objection, it does not appear that the devisees of *Henry Swift* were duly appointed trustees of the will of *Samuel Swift*; and even if they were, his devisees and executors had no

authority to execute the trust for sale, not having the legal estate.

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"Messrs. *Cripps* and *Clarkson*."

"*James Patten*."

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"7th *April*, 1860.

"Dear Sir,

"*Swift* to *Stevens*."

"Your first objection appears to us unnecessary to answer. The trustees, Messrs. *Harmer* and *Swift*, no doubt obtained the best price they could for the property. Our client had been in possession for many years. Messrs. *Harmer* and *Swift* will no doubt be happy to answer any inquiries you may address to them. As to the other objection, we can only rely upon Mr. *Francis Turner's* opinion, which is set out in the abstract. This opinion appears clear and positive.

"*James Patten*, Esq."

"*Cripps* and *Clarkson*."

"9th *April*, 1860.

"Dear Sirs,

"*Swift* to *Stevens*."

Notwithstanding your letter, received this morning, treats my first objection so lightly, there can be no doubt that it is a valid one unless Messrs. *Harmer* and *Swift* can satisfactorily explain why, so recently as five years since, they sold the property in question for so small a sum as 73*l.* 4*s.*, when it was manifestly worth much more. Without such satisfactory explanation, their having done so must be looked upon as such a palpable breach of duty as affects your client's title. My client has nothing to do with Messrs. *Harmer* and *Swift*, and will look to your client alone for the required explanation. As to the other objection, although I have a great respect for Mr. *Turner's* opinion, yet, as I consider the case submitted to him omitted to call his

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attention to what ought to have been stated in it, I cannot consider his opinion satisfactory, much less conclusive.

“Messrs. *Cripps & Clarkson.*”

“*James Patten.*”

There was some further correspondence; in which Messrs. *Cripps* and *Clarkson* stated, as explaining the inadequacy of the price paid by *Samuel Swift* for the property, that he was really the person beneficially entitled to it. They, however, offered no proof that such was the fact. Ultimately the plaintiff, through his solicitor, refused to complete the purchase, and, after demanding back his deposit, brought this action.

The plaintiff obtained a verdict, leave being reserved to the defendant to move to enter it for him.

Hawkins, in last *Michaelmas* Term, obtained a rule calling on the plaintiff to shew cause why the verdict should not be entered for the defendant, on the ground that there were no such defects in the vendor's title as entitled the plaintiff to rescind the contract and recover back the deposit.

Tompson Chitty now shewed cause. The plaintiff was entitled to rescind the contract, the vendor's title being defective in two respects. First; the original devise having been to two named trustees, their heirs, executors and administrators, upon trust that they, or the survivor of them, or the heirs, executors, or administrators of such survivor, should sell the property, the survivor of these trustees was unable, by reason of the omission of the word “assigns” in the words creating the trust, to give his devisees the power of sale which he might have exercised himself. *Henry Swift's* devisees and executors,

therefore, could not make a good title to *Samuel Swift*, their vendee and the plaintiff's vendor. In *Cooke v. Cranford* (a), where an original devise to trustees was in similar terms, omitting the word "assigns," *Shadwell V. C.*, following his previous decision in *Bradford v. Belfield* (b), held that the persons to whom the surviving trustee devised could not execute the trust for sale. In the course of his judgment he says (c), "My opinion is that it is not beneficial to the testator's estate that he" (the surviving trustee) "should be allowed to dispose of it to whomsoever he may think proper; nor is it lawful for him to make any disposition of it. He ought to permit it to descend; for, in so doing, he acts in accordance with the devise made to him." In *Ashton v. Wood* (d), the first devise was to trustees and the survivor of them, and the heirs and assigns of such survivor; yet *Stuart V. C.* held that there was sufficient doubt upon the point whether the trust to sell passed by the devise of the survivor, to prevent the Court from forcing the title on a purchaser. In *Sugden on Powers*, ch. 4. s. 1. p. 133. (ed. 8.), it is laid down that "A mere power cannot be transferred by the donee by act inter vivos or by will. Where trustees take the legal estate simply upon trust, *e. g.* to sell, the case admits of a different view; although the testator speaks of his trustees, yet, as the legal estate survives, and the trusts bind it, the survivor can execute the trust. But where the trust is limited to the trustee and his heirs, he, of course, cannot constitute another a trustee by conveyance." "Where the trust is reposed in assigns, it has been held and appears now to be settled that the devisees

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(a) 13 *Sim.* 91.(b) 2 *Sim.* 264.(c) 13 *Sim.* 97, 98.(d) 3 *Sm. & G.* 436.

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of the surviving trustee are capable of executing the trusts. Where the trust was not extended to assigns, the title under a devisee of the trustee has in several instances been decided not to be a marketable one." [Hill J. *Wilson v. Bennett* (a) is much in point. There, copyhold hereditaments were devised to three trustees, and their heirs, executors and administrators, in trust for two tenants for life successively, with a power to the trustees, and the survivors and survivor of them, his heirs, executors, or administrators, to sell the same. The survivor of the three trustees devised all estates vested in him as trustee to two trustees, whom he also appointed his executors, of whom one was his customary heir; the two contracted to sell, and the purchaser declined to complete. *Parker* V. C. held that the title was too doubtful for the Court to compel the purchaser to take it. *Blackburn* J. A Court of equity will not compel a purchaser to take a doubtful title; but must not we, in a Court of law, determine whether the title is legally good or bad? Hill J. In *Boyman v. Gutch* (b), which was an action to recover the deposit on a purchase, *Tindal* C. J., in delivering the judgment of the Court of Common Pleas, held that the only question for the Court to consider was, whether the defendant had or had not a legal title to convey to a purchaser. But in *Jeakes v. White* (c), which was followed in *Simmons v. Heseltine* (d), it was said by the majority of the Court of Exchequer that, where a question arises at law as to the meaning of a good title, such a title must be understood as a Court of equity would adopt as a sufficient ground for compelling specific performance by a pur-

(a) 5 *De G. & Sm.* 475.(b) 7 *Bing.* 379.(c) 6 *Exch.* 873.(d) 5 *C. B. N. S.* 554.

chaser.] Secondly, the inadequacy of the purchase money given by the plaintiff's vendor was *prima facie* a breach of trust; by which the plaintiff, having notice of it, would be affected.

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Honyman and *J. C. Mathew*, in support of the rule. First; in the cases cited on the other side it was not decided that such a title as that in the present case was absolutely bad by reason of the devisee, and not the heir, of the surviving trustee having conveyed; but only that a Court of equity would not, in such a state of title, decree specific performance. *Cooke v. Crawford* (a) has been much questioned; and the doctrine there laid down ought not to be extended. In *Bradford v. Belfield* (b) the original trust was not created by a devise, but by indentures of lease and release, *inter vivos*. In *Ashton v. Wood* (c), in which *Stuart V. C.* censures *Cooke v. Crawford* (a), the title was in other respects too doubtful to be forced upon the purchaser. The same may be said of *Wilson v. Bennett* (d). [*Wightman J.* In that case *Parker V. C.* says (e), "There is no doubt that a trustee can devise a trust estate; but the question in every case is, whether the devise is in accordance with the title under which the trustee holds."] Upon the creation of a trust in *A. B.* and *C. D.*, and the heirs of the survivor, there can be no personal confidence in the heirs of the survivor; for it is uncertain who will be the survivor, and who the heirs of the survivor. In *Titley v. Wolstenholme* (f) *Lord Langdale M. R.* makes the following observations, which are extremely to the point in the

(a) 13 *Sim.* 91.(c) 3 *Sm. & G.* 436.(e) 5 *De G. & Sm.* 479.(b) 2 *Sim.* 264.(d) 5 *De G. & Sm.* 475.(f) 7 *Beav.* 425. 434.

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present case: "When a trust estate is limited to several trustees, and the survivors and survivor of them, and the heirs of the survivor of them, and no power of appointing new trustees is given, we observe a personal confidence given, or at least probably given, to every one of the several trustees. As any one may be the survivor, the whole power will eventually come to that one, and he is entrusted with it, and being so, he is not, without a special power, to assign it to any other; he cannot, of his own authority, during his own life, relieve himself from the duties and responsibilities which he has undertaken. But we cannot assume, that the author of the trust placed any personal confidence in the heir of the survivor; it cannot be known, beforehand, which one of the several trustees may be the survivor; it cannot be known, beforehand, whether he may have an heir or not, or whether the heir may be one, or may consist of many persons, trustworthy or not, married women, infants, or bankrupts, within or without the jurisdiction. The reasons, therefore, which forbid the surviving trustee from making an assignment *inter vivos*, in such a case, do not seem to apply to an assignment by devise or bequest, which, being made to take effect only after the death of the last surviving trustee, and consequently after the expiration of all personal confidence, may, perhaps not improperly, be considered as made without any violation or breach of trust. It is to take effect only at a time when there must be a substitution or change of trustees:—there must be a devolution or transmission of the estate, to some one or more persons not immediately or directly trusted by the author of the trust:—the estate subject to the trusts must pass either to the *hæres natus* or the *hæres factus* of the surviving trustee; and if the heir or heirs at law, what-

ever may be their situation, condition, or number, must be the substituted trustee or trustees, the greatest inconveniences may arise, and there are no means of obviating them other than by application to this Court. With great respect for those who think otherwise, and quite aware that some inconveniences, which can only be obviated in this Court, may arise, from devising trust estates to improper persons, for improper purposes, I cannot, at present, see my way to the conclusion, that in the case contemplated, the surviving trustee commits a breach of trust by not permitting the trust estate to descend, or by devising it to proper persons, on the trusts to which it was subject in the hands of the surviving trustee." [*Hill J.* In that case the word "assigns" was in the devise creating the trust; and Lord *Langdale M. R.* goes no further in overruling *Cooke v. Crawford (a)* than does *Parker V. C.* in *Wilson v. Bennett (b)*. If an estate is conveyed to *A.*, his heirs and assigns, in trust that he, his heirs or assigns, shall sell, the words "heirs and assigns" are indefinite words. But in *Cooke v. Crawford (a)* *Shadwell V. C.* said, "There is no case in which a person not mentioned by the party creating the trust has been held entitled to execute it." And *Parker V. C.*, in *Wilson v. Bennett (b)*, upholds *Cooke v. Crawford (a)*, upon that narrow ground.] In *Mucedonald v. Walker (c)*, where the word "assigns" was not in the power of sale, *Romilly M. R.* considered *Cooke v. Crawford (a)* and *Titley v. Wolstenholme (d)* conflicting authorities; but, as the word assigns was not in the power, he acted on the principle that the title was too doubtful to induce the

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(a) 13 *Sim.* 91.(c) 14 *Beav.* 556.(b) 5 *De G. & Sm.* 475.(d) 7 *Beav.* 425.

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Court to compel a purchaser to take it. In *Hall v. May* (a), where the word "assigns" was in the devise creating the trust, *Wood V. C.* declined to extend the doctrine of *Cooke v. Crawford* (b), and recognised *Titley v. Wolstenholme* (c). In the present case the devisees were also executors, and the terms of the devise shew the testator's intention to have been that the executors should sell the property and apply the proceeds in execution of the trusts. [*Wightman J.* The testator had personal as well as real estate, and the devise must be construed *reddendo singula singulis*.] Secondly; as to the alleged inadequacy of the consideration given by the plaintiff's vendor for the property; it is not shewn affirmatively that he did not give a fair price for it.

WIGHTMAN J. In this case I am of opinion that there are such defects in the title of the vendor as to entitle the plaintiff to rescind the contract and recover back his deposit. *Samuel Swift* by his will devised his real and personal estate to his two sons, *William Swift* and *Henry Swift*, their heirs, executors and administrators, in trust that they, or the survivor of them, or the heirs, executors, or administrators of such survivor, should sell, and apply the proceeds of the sale according to the directions contained in the will. *William Swift* died, and *Henry Swift* was the survivor: and *Henry Swift* by his will devised his trust estates to two persons, neither of whom was his heir, whom he also appointed executors of his will. The question is, whether the persons whom he named devisees of the real estate and

(a) 3 K. & J. 585.

(b) 13 Sim. 91.

(c) 7 Beav. 425.

executors of the personal estate of which he was seised or possessed in trust at the time of his death, can make a good title to a purchaser. The word "assigns" being wholly omitted in the will of the first testator, the question is, can the assignee of the surviving trustee under that will make a good title? The case of *Cooke v. Crawford* (a) is a direct authority that the devisee of a trustee appointed under such a will as that of *Samuel Swift* is not a person who can give a good title to a purchaser. That decision has been commented on in many, and questioned in several, subsequent cases. In *Wilson v. Bennett* (b) *Parker V. C.* states, as the ground upon which it proceeded, "that a trust cannot be delegated to persons not contemplated in its original creation." Though the legal estate passes by the devise of the trustee, his devisee has no such power to sell as entitles him to convey. *Wilson v. Bennett* (b) stood upon a different ground, namely, that "the testator did not contemplate such an event as that the estate should vest in one person and the power go to another." But, though the Vice Chancellor said that the decision in *Cooke v. Crawford* (a) had been understood as going beyond what it really imported, he did not affect to determine that it was not law. In *Ashton v. Wood* (c) *Stuart V. C.* makes some strong comments on the doctrine of *Cooke v. Crawford* (a). He says "It was decided upon a very narrow ground—as narrow a ground as could well be taken. It was held that, because the word "assigns" was not used, the trustee for sale, on a devolution of the legal estate, had put it in such a state as that not only the person who had the legal estate could

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(a) 13 *Sim.* 91.(b) 5 *De G. & Sm.* 475. 479.(c) 3 *Sm. & G.* 436. 446.

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not execute the trust, but that he could devise the trust estate without the power that was annexed to it. Lord *St. Leonards*, with his great knowledge of the law in such cases, has said that that was an extremely strict construction; and he seems to regret, as I do, that it ever should have been held that a mere legal estate should pass by devise to a man who must hold it in trust for somebody, and yet that the power annexed to the legal estate was one which he could not exercise." *Stuart V. C.* goes on to say that "A different view might have been taken by the Court if the matter had been fully considered upon the principle stated in the case of *Whitfield v. How (a)*." And, after stating the decision in that case, he says "That seems to shew that where there is a legal estate with a power annexed to it, and the legal estate is devised, the power should pass with the legal estate to which it is annexed, unless there be something peculiar to evince an intention that the power was not to be transmissible with the legal estate. But it seems that a contrary doctrine has been established in this Court, on what Lord *St. Leonards* calls a stream of authority, much too strong for me to resist." I feel myself in the same position as the Vice Chancellor. *Wilson v. Bennett (b)*, in which the original devise contained the same limitation as in the will before us, and the devisees of the surviving trustee were also appointed his executors, is also a decisive authority that the executors would not be the proper persons to execute the power of sale. The plaintiff's vendor, therefore, who was the vendee of the two devisees under the will of the survivor of the original trustees appointed by the will

(a) 2 *Show.* 57.

(b) 5 *Do G. & Sm.* 475.

of *Samuel Swift*, did not establish such a title as the plaintiff was bound to accept. I also think that, on the ground of the total inadequacy of the consideration paid for the estate by the vendor, with notice of which the plaintiff was affected, it would not be safe for the plaintiff to accept the title.

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(CROMPTON J. was absent.)

HILL J. I am of the same opinion. I think that the vendor has not made out such a title as the vendee is bound to accept, and that the latter is therefore entitled to rescind the contract and demand back the purchase money. The vendor has failed in two respects. First: he traces his title through the trustees of *Samuel Swift's* will. *Samuel Swift* devised to two persons, their heirs, executors and administrators, in trust that they, or the survivor, or the heirs, executors, or administrators of the survivor, should sell; the word "assigns" being omitted. The surviving trustee devised this trust estate, and his devisees sold to the plaintiff's vendor. According to the authorities a trust cannot be exercised by a person not contemplated in the original creation of the trust; therefore, the word "assigns" not being in the original devise, the devisee of the surviving trustee has no power to convey the estate. Whether those authorities would be upheld in a Court of error I do not presume to say: it is sufficient for us that the law has been so laid down in a Court of coordinate jurisdiction. A second objection to the title of the vendor is, that the devisees under the will of the surviving trustee sold to the vendor for a very inadequate price; and that a purchaser with notice of that fact takes the estate subject to

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the trust for the persons beneficially interested. The law with regard to trustees is very strict. Lord *St. Leonards* says, in his book on Vendors and Purchasers, ch. 1, sect. 5, p. 50 (13th ed.), "Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price; and that in the execution of the trust they will pay equal and fair attention to the interest of all persons concerned." Either the trustees have not done that in the present case, or, if they have, they have allowed the contrary to appear.

BLACKBURN J. I am of opinion that the rule should be discharged. But I wish to say that I am not prepared to agree with my learned Brothers in all respects as to the first ground. The first question appears to me to be whether we are not bound to decide absolutely that the vendor's title is either good or bad; or whether it is enough to say that the title is so doubtful that a Court of equity would not decree specific performance. I used to think that a Court of law was bound to decide absolutely that the title was good or bad; but in *Jeakes v. White* (a) and *Simmons v. Heseltine* (b), though the contrary was not decided, doubt was thrown upon that view. If, therefore, I had only come to the conclusion that the title in the present case was doubtful, I should wish for time to consider whether those two authorities are so strong as to bind us. So, again, if the only objection to the title was grounded on the decision of *Shadwell V. C.* in *Cooke v. Crawford* (c), I should also wish for time to consider whether we ought to be bound by that case; for although all the subsequent decisions referring to

(a) 6 *Exch.* 873.(b) 5 *C. B. N. S.* 554.(c) 13 *Sim.* 91.

that case say that it is not overruled, they do not altogether confirm it. I do not wish to be considered as expressing an opinion that that decision was wrong: I only desire to pause before acting on it.

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The other ground of objection to the title of the vendor is the inadequacy of the consideration given by him on his purchase from the devisees of the surviving trustee, of which the plaintiff had notice. On that ground the title of the vendor is as bad as it well could be.

Rule discharged.

IRISH PEAT COMPANY *against* PHILLIPS.

Wednesday,
February 13th.

[Reported, in the Queen's Bench and in the Exchequer Chamber on error from that Court, 1 B. & S. 598.]

1860.

Friday,
June 15th.

ASHWORTH *against* STANWIX and WALKER.

1861.

Saturday,
February 23rd.

DECLARATION: That defendants were possessed of a certain coal pit, wherein there was a shaft; and

The principle that a servant sustaining an injury from the negligence

of a fellow servant while engaged in the common employment cannot recover in an action against the common master, does not exempt from liability to action a master who himself takes part in the servant's work, and whilst so doing injures the servant through negligence.

If the master is a member of a partnership by whom the servant is employed, and the work in which he so takes part is within the scope of the common undertaking of the partnership, his co-partners are jointly liable with him for the injury thus caused to the servant by his negligence.

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that plaintiff was lawfully employed in the said pit at the bottom of the said shaft; and in which said pit a certain corf was used by defendants for the purpose of raising coal from the said pit to the mouth of the said shaft; yet defendants so negligently guarded the mouth of the said shaft, and so carelessly used and managed the said corf, and took so little care of a certain plate or rail of defendants at the mouth of the said shaft, that, by reason of the carelessness, &c., of defendants the said plate or rail fell down the said shaft, and struck plaintiff on the head with great force and violence, and fractured his skull; whereby plaintiff became, was and is permanently injured, &c.

Pleas. 1. Not guilty. 2. Not possessed. Issues thereon.

At the trial, before *Blackburn J.*, at the *Durham Spring Assizes*, 1860, it appeared that the two defendants were lessees of a coal pit, and were, in that respect, in partnership together. The plaintiff was a pitman employed in the pit by them. On the day when the accident happened he was so employed, and the defendant *Walker* was acting as banksman at the mouth of the shaft. For the purpose of emptying the corves as they came up full of coal from the pit, there was a short tramway made of the usual rails or plates. The banksman's duty was to receive the full corf as it came up, to place it on a tram which travelled upon the tramway, and to hook on the corf which was to go down empty. There was evidence that one of the tramplates was loose, and it appeared that while the defendant *Walker* was acting as banksman, and after he had been told of the insecure state of this tramplate, it fell down the pit and caused severe injury to the plaintiff, who was standing at the

bottom of the shaft. The defendant *Walker* was clearly guilty of negligence; but it was not shewn that *Stanwix*, who was absent at the time of the accident, knew that the tramplate was loose.

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The jury found a verdict for the plaintiff as against *Walker*, and by the direction of the learned Judge a verdict for the defendant *Stanwix*; leave being reserved to the plaintiff to move to enter a verdict against both defendants.

Manisty had obtained a rule calling on the defendant *Stanwix* to shew cause why a verdict should not be entered for the plaintiff against both the defendants, on the ground that there was evidence to go to the jury upon which they might reasonably have found a verdict for the plaintiff against *Stanwix*, as well as against *Walker*.

Overend shewed cause (a). This is quite a new case; that of a servant suing his masters in respect of an injury caused by the negligence of one of the masters while acting as a servant in working with the plaintiff. In principle, however, the well settled rule applies that a master is not responsible to a servant for injury caused to him by the negligence of a fellow servant in the course of the common employment. For the purposes of the case the defendant *Walker*, through whose negligence whilst acting in the capacity of banksman at the pit the accident happened, may be regarded as a fellow servant of the plaintiff; and the other defendant, *Stanwix*, as the

(a) *Friday, June 15th, 1860. Before Cockburn C. J., Wightman J. (who was present during part only of the argument), Crompton and Blackburn Js.*

1861. master of them both. The plaintiff must be taken to have run the risk, in entering the service, of injury happening to him from the negligence of *Walker*, whom he must have known to be a person with whom he would have to work. [*Cockburn* C. J. Can a servant be supposed to contemplate the peculiar risk of an injury caused by the negligence of his master while acting as a fellow servant?] *Roberts v. Smith* (a) shews that personal interference and negligence on the part of a master gives a servant, injured in consequence, a right of action; and in that view *Walker* may be personally liable as master. His negligence, however, was not such negligence, quâ master, as to affect his co-partner *Stanwix* with liability. A master who does not personally interfere is not liable, if he employs competent servants and provides competent machinery for the work; *Bartonshill Coal Company v. Reid* (b). [*Blackburn* J. That was a *Scotch* appeal; and in *Scotland* there has been great resistance to the establishment of the rule on this subject, as now settled in *England*.] In *Southcote v. Stanley* (c) it was held that the defendant, an hotel keeper, was not liable to the plaintiff, who was visiting him, by his request, at the hotel, for an injury sustained by the plaintiff through the falling of a piece of glass upon him from a door which it was necessary to open for the purpose of leaving the hotel, and which was in an insecure condition. The principle of that case is in favour of the defendant *Stanwix*; and *Skipper v. Eastern Counties Railway Company* (d) and *Wiggett v. Fox* (e) are further authorities in point.

(a) 2 H. & N. 213.

(b) 3 McQ. Sc. App. Ca. 266.

(c) 1 H. & N. 247.

(d) 9 Exch. 223.

(e) 11 Exch. 832.

(WIGHTMAN J. here left the Court.)

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Manisty and *Davison*, *contra*. Even if *Walker* is to be regarded as the servant of *Stanwix*, he was not the less, in conjunction with *Stanwix*, the plaintiff's master; and the cases shew that, although a master is not liable to a servant for an injury caused to him by the negligence of a fellow servant, he is liable if he himself interferes personally, and is guilty of negligence conducing to the injury. In the present case, *Walker*, by his personal negligence, caused the injury to the plaintiff; and *Walker's* negligence is in law the negligence of *Stanwix* also. But, further, in *Paterson v. Wallace and Company* (a) Lord Cranworth C. says: "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. This is the law of *England* no less than the law of *Scotland*. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when in fact the master knows, or ought to know, that it is not so. And if from any negligence in this respect damage arise, the master is responsible." *Brydon v. Stewart* (b) is to the same effect, and shews that a master who lets a workman down his mine is bound to bring him up safely, even though he come up on his own business, and not on that of his master. In *Bartonskill Coal Company v. Reid* (c) Lord Cranworth C. laid down the same principle, as follows: "When a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle

(a) 1 *McQ. Sc. App. Ca.* 748, 751. (b) 2 *McQ. Sc. App. Ca.* 30.(c) 3 *McQ. Sc. App. Ca.* 266, 268.

1861. and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks." And in *Bartonshill Coal Company v. McGuire* (a) Lord Chelmsford expressed his entire concurrence in Lord Cranworth's opinion. Both *Walker* and *Stanwix*, therefore, were bound to protect the plaintiff from unnecessary risks, the service being dangerous. *Stanwix* delegated this duty to *Walker*, and *Walker*, as the evidence shews, grossly neglected it in not taking measures to secure the tramplate which injured the plaintiff, though *Walker* knew that it was loose. That the negligence of one of several partners while acting for the rest in the partnership business is in law the negligence of all, is shewn by *Moreton v. Hordern* (b), where all the proprietors of a stage coach were held responsible for an injury caused to the plaintiff by the negligence of one of them while driving the coach. In the last place, there was no evidence whatever to support the contention on the other side, that *Walker* was a fellow servant with the plaintiff.

Cur. adv. vult.

CROMPTON J. now delivered the judgment of the Court. The question to be determined in this case is, whether the defendant *Stanwix*, being co-proprietor with the other defendant, *Walker*, of a mine, is jointly liable with him for an injury sustained by the plaintiff, a workman in their common employ, through the negligence of the defendant *Walker*. The facts are such that, if the defendant *Walker* had been simply the fellow workman of the plaintiff, the case would have come within the

(a) 3 *McQ. Sc. App. Ca.* 300, 303.

(b) 4 *B. & C.* 223.

principle that a servant sustaining an injury from the negligence of a fellow servant engaged in the same employment, cannot recover against the common master. The present case would then have been quite analogous to that of *Bartonshill Coal Company v. Reid* (a). But the present case is distinguishable from the class of cases which have been referred to, in the important particular that the defendant *Walker*, although in fact engaged jointly with the plaintiff in the work of the mine, was also a co-proprietor, and, as such, one of the plaintiff's masters; and the question is, whether this circumstance takes the case out of the before mentioned rule, and calls for the application of a different principle. We are of opinion that it does, and that the plaintiff is entitled to hold the defendant *Stanwix* responsible for the negligence of his co-proprietor and partner. The doctrine that a servant, on entering the service of an employer, takes on himself, as a risk incidental to the service, the chance of injury arising from the negligence of fellow servants engaged in the common employment, has no application in the case of the negligence of an employer. Though the chance of injury from the negligence of fellow servants may be supposed to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master, when engaged with him in their common work, enters in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position and presumable sense of duty of the latter ought to command. The relation of master and servant does not the less

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subsist because, by some arrangement between the joint masters, one of them takes on himself the functions of a workman. It is a fallacy to suppose that on that account the character of master is converted into that of a fellow labourer. Though engaged with the plaintiff in a common employment, *Walker* did not the less remain the master of the plaintiff, and the partner of the defendant *Stanwix*. This being so, it follows that *Stanwix* must be liable in respect of the negligence through which injury has arisen to the plaintiff, as the relation of partner subsisted between *Walker* and *Stanwix*; and as the negligence was in a matter within the scope of a common undertaking we think that *Stanwix* is equally liable with *Walker*. That a partner is liable for the negligence of his co-partner when engaged in the business of the partnership is not only clear in principle, but is established by the case of *Moreton v. Hordern* (a) in this Court, where two proprietors of a stage coach were held liable with a third for the negligence of the latter, by whom the coach had been driven. Now it has never been doubted that for personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable. Personal negligence is clearly established against *Walker*; and, it being admitted that the defendant *Stanwix* was his co-proprietor and partner, the latter must be held to be jointly responsible in respect of such negligence, and is therefore liable in this action. The rule must be made absolute to enter the verdict against him, as well as against the other defendant.

Rule absolute.

(a) 4 B. & C. 223.

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1860.

Tuesday,
June 5th.
Thursday,
June 7th.

1861.

Saturday,
February 23rd.

CASTRIQUE *against* BEHRENS and others.

DECLARATION. For that, before the committing by defendants of the grievance hereinafter mentioned, one *John George Claus*, of *Liverpool*, a *British* subject, was the sole registered owner of a certain ship called *The Ann Martin*, and her appurtenances, which ship was, at the time *Claus* was her owner, and up to the time of the sale of the said ship hereinafter mentioned, a *British* ship, and duly registered as such pursuant to the statutes for the time being in force relating to the registering of *British* vessels; and, on 30th *November*, 1854, whilst *Claus* was such owner and so registered, he, by bill of sale duly made and registered pursuant to the said statutes, assigned and transferred by way of mortgage all his estate and interest in the said ship and her appurtenances to one *Thomas Harrison*, and *Harrison* became and was registered as the mortgagee of the said ship and her appurtenances, according to the provisions of the said statutes. And on 2nd *February*, 1855, and whilst *Harrison* was such registered mortgagee, he, by bill of sale duly made and registered pursuant to the said statutes, assigned and transferred

The principle that, in an action for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of plaintiff, it is essential to shew that the proceeding alleged to be instituted maliciously and without reasonable and probable cause has terminated in favour of plaintiff, if from its nature it be capable of such a termination, applies where an action is brought for falsely and fraudulently causing a proceeding to be taken in a foreign Court to the damage of plaintiff. A declaration therefore in such an action, on the face of which it appears that the foreign Court was one of competent jurisdiction in the proceeding, and gave therein a judgment in rem to the damage of the now plaintiff, which judgment remains unreversed; and it does not appear that the now plaintiff, though he was not an original party to the proceeding, might not have intervened, or did not in fact intervene, and obtain a hearing therein; is bad on demurrer.

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all his interest in the said ship and her appurtenances to one *Richard Emley*, and *Emley* became and was registered as the mortgagee of the said ship and her appurtenances, according to the provisions of the said statutes. And on 9th *April*, 1854, and whilst *Emley* was such registered mortgagee, he, by bill of sale duly made pursuant to the said statutes, assigned and transferred all his interest in the said ship and her appurtenances to plaintiff. And in *December*, 1853, the said ship sailed from *Liverpool* on a voyage to *Melbourne*, in *Australia*, and from thence back to *England*, calling at the port of *Havre de Grâce*, in the *French* empire; and one *William Benson* was, during the said voyage, the master of the said ship; and in the course of the said voyage, at *Melbourne* aforesaid, *Benson* drew a certain bill of exchange, dated 8th *June*, 1854, on *Claus*, the then owner of the said ship, by the name and designation of *George Claus & Co.*, *Liverpool*, requiring *George Claus & Co.*, eight days after sight, to pay to the order of certain persons by the name and designation of Messrs. *Levien & Steinitz* the sum of 601*l.* 16*s.* 6*d.*, for and on account of certain necessary disbursements for the ship called the *Ann Martin*. And Messrs. *Levien & Steinitz*, without any value or consideration for such indorsement, or for defendants becoming the holders of the said bill, indorsed the said bill to defendants, then being *British* subjects residing at *Liverpool*, in *England*. And defendants, then being *British* subjects residing in *England*, being the holders of the said bill, the said bill was duly presented for acceptance to *G. Claus & Co.*, and was dishonoured. And defendants, well knowing the premises, and that the said ship was about to call, on her said voyage from *Melbourne* to *England*, at the port of

Havre de Grâce, in the empire of *France*; and well knowing, as the fact is, that by the law of *France* when, during a voyage, a bill of exchange is drawn by the master of a ship upon the owner of such ship for and on account of necessary disbursements for the ship, a *French* subject, if he be the bonâ fide holder for value of such bill, but not otherwise, may, if the ship be in any port of the empire of *France*, take proceedings in rem in the Courts of the said empire to attach the ship in such port, and to sell and dispose of such ship for the purpose of paying such bill and the costs of such proceedings; afterwards, and after *Claus* had ceased to be the owner of, and plaintiff had become and was interested in, the said ship as aforesaid, and after the said bill had been dishonoured, falsely, fraudulently and unlawfully contriving and intending to deprive plaintiff of his property and interest in the said ship, and to cause the said ship to be sold for payment of the said bill of exchange, fraudulently and unlawfully conspired with one *Etienne Troteaux*, then being a *French* subject residing in *France*, that defendants should indorse the said bill to *Troteaux* without any value or consideration for such indorsement, and that *Troteaux* should take proceedings in the Tribunal of Commerce at *Havre*, and also in the Civil Tribunal at *Havre*, to attach the said ship and her appurtenances at the said port, and to obtain a sale of the same for the purpose of paying the said bill out of the proceeds of such attachment and sale; and that for that purpose *Troteaux* should falsely and fraudulently represent to the said Tribunal of Commerce and to the said Civil Tribunal at *Havre*, that he, *Troteaux*, then was the bonâ fide holder of the said bill for good and valuable consideration, in order thereby

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falsely and fraudulently to obtain an order of the said Tribunals for the attachment and sale of the said ship for the purpose of paying the said bill of exchange. And afterwards, and after the said bill had become due and had been dishonoured, defendants, in pursuance of the said conspiracy, did indorse the said bill to *Troteaux*, without any value or consideration for such indorsement. And thereupon *Troteaux*, upon the arrival of the said ship at the port of *Havre*, took proceedings in the said Tribunal of Commerce and also in the said Civil Tribunal at *Havre*, to attach the said ship and to obtain a sale of the same for the purpose of paying the said bill out of the proceeds of such sale; and did falsely and fraudulently represent to the said Tribunals respectively that he was the bonâ fide holder of the said bill for good and valuable consideration; and thereby obtained from the said Tribunals orders for the attachment and sale of the said ship, for the purpose of paying the amount of the said bill and the costs of such proceedings. And thereby plaintiff wholly lost and has been deprived of his property and interest in the said ship and her appurtenances.

Demurrer. Joinder in demurrer (a).

Holl, for the plaintiff (b). The declaration discloses a good cause of action. The gist of it is that it charges the defendants with a conspiracy to deprive the plaintiff of his property in the ship *Ann Martin*, by a fraudulent

(a) There were also demurrers by the plaintiff to two of the pleas, and a demurrer by the defendants to the replication; but these pleadings and the arguments upon them are omitted, as it became unnecessary for the Court to give an opinion upon their validity.

(b) Tuesday, June 5th, 1860. Before Cockburn C. J., Wightman, Crompton and Blackburn Js.

indorsement of the bill of exchange to *Troteaux*, with intent that he should falsely represent himself as a bonâ fide holder for value, and so attach the ship under the *French* law. *Coze v. Smithe* (a) is a case in point. There it was held that an action lay for causing the plaintiff to be deprived of his office by means of a false affidavit of malfeasance by him therein. In *Fitzherbert De Nat. Brev.* 116 D., it is laid down that "Conspiracy shall be maintainable against those who conspire to forge false deeds which are given in evidence, by which any person's land is lost." *Gerhard v. Bates* (b) shews that there is no necessity for any privity between the parties to support an action of tort for a false representation. In principle, therefore, it is immaterial, with regard to such an action as the present, whether the false representation was made to the plaintiff himself, or to some other person who had power to deprive him of his property. *Gregory v. Duke of Brunswick* (c) shews that an action lies for a conspiracy to hiss an actor off the stage; so that acts, innocent in themselves, if done for a wrongful purpose, are actionable. Hence, in the present case, the defendants' fraudulent intent in indorsing the bill to *Troteaux*, makes them liable to the plaintiff. It will be said, on the other side, that the action is, in effect, for the abuse of the process of a foreign Court. But first, the gist of the action is the conspiracy in this country to deprive the plaintiff of his property by means of the overt acts of indorsing the bill to a *French* subject and of the false representation by that person to the *French* Court that he was an indorsee for value. And, secondly, an action lies for falsely and maliciously abusing the process of

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(a) 1 *Lev.* 119.(b) 2 *E. & B.* 476.(c) 6 *M. & G.* 205.

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any Court. *Grainger v. Hill* (a), *Heywood v. Collinge* (b), *Whitelegg v. Richards* (c), *Daniels v. Fielding* (d), *Farley v. Danks* (e), are instances of actions for such an abuse of the process of Courts in this country. A fortiori ought such actions to lie, in our Courts, for an abuse of the process of a foreign Court, lest the person injured thereby should be without redress in the country where the wrong is committed. The other side may rely upon a class of cases which decide that a false statement made in the course of a trial is not the subject of an action: but the present case differs from them in this, that here the process of the Court was set in motion by the false statement and conspiracy. In 12 Rep. 128, tit. "*False Affidavits*," it is laid down that one may have an action against another to recover damages for perjury by which damages accrue: and in *Revis v. Smith* (f) *Willes J.* seems to have been of opinion that an action may be brought in respect of any damage which the plaintiff has sustained, or which has been brought about, by means of an affidavit made by the defendant, causing the plaintiff to be harassed by illegal proceedings. [*Crompton J.* It appears from the declaration that the French Courts gave judgment in favour of *Troteaux*. Was not that a judgment in rem, and, as such, binding, till reversed, on all the world, and, therefore, on the plaintiff?] The Court of Common Pleas has held that this very judgment was not a judgment in rem (g). But even if they were wrong in so holding, a judgment

(a) 4 B. N. C. 212.

(b) 9 A. & E. 268.

(c) 2 B. & C. 45.

(d) 16 M. & W. 200.

(e) 4 E. & B. 493.

(f) 18 C. B. 126. 142.

(g) In *Castrique v. Imrie*, 8 C. B. N. S. 1. That decision has, however, been reversed on appeal by the Exchequer Chamber. *Imrie v. Castrique*, 8 C. B. N. S. 405.

in rem may be avoided, if fraudulently obtained. *De Grey* C. J., in delivering the opinion of the Judges in *Duchess of Kingston's Case* (a), says "Like all other acts of the highest judicial authority, it" (the sentence of the Spiritual Court) "is impeachable from without: although it is not permitted to shew that the Court was mistaken, it may be shewn that they were misled. Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of Courts of justice. Lord *Coke* says, it avoids all judicial acts, ecclesiastical or temporal." Mr. *Smith*, in his notes to that case, commenting upon the extent to which a foreign judgment is to be held binding here, observes (b): "It is" "not too much to say, that our Courts would allow" it "to be impeached by extrinsic evidence, shewing distinctly that the Court which pronounced it had no jurisdiction," "or that it was obtained by fraud, for that, to use the language of the Lord Chief Justice, is an extrinsic collateral act, which vitiates the most solemn proceedings even of our own Courts." The plaintiff having been no party to the proceedings in the *French* Courts, and having had no opportunity of intervening, the judgment, even if it be in rem, is not binding on him, having been obtained by fraud. Even in an action for a malicious prosecution, the rule that the plaintiff is bound to shew a termination in his favour of the proceedings of which he complains, does not apply where those proceedings are ex parte, and must of necessity terminate unfavourably to him; *Steward v. Gromett* (c). In *Story's Conflict of Laws*, sect. 592, cap. 15, p. 986 (ed. 3), it is laid down that a judgment in rem against

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(a) 2 Sm. L. C. 650 (ed. 5.).

(b) 2 Sm. L. C. 684. (ed. 5.).

(c) 7 C. B. N. S. 191.

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movable property within the jurisdiction of the Court pronouncing the judgment, and exercising a jurisdiction in rem, is conclusive. But the author adds that "The doctrine" "is always to be understood with this limitation, that the judgment has been obtained bonâ fide and without fraud; for if fraud has intervened, it will doubtless avoid the force and validity of the sentence." [*Wightman J.* In *Smith v. Tonstall* (a) an action was held to lie against the defendant for conspiring with one *W. S.* to procure the latter to confess a judgment to a person to whom he owed nothing, in order to defeat an execution by the plaintiff against *W. S.* for rent arrear: and the decision was affirmed on error to Parliament. *Crompton J.* There the judgment confessed was not a judgment in rem. *Wightman J.* referred to *Savill v. Roberts* (b).] The rule that the proceedings complained of must be shewn to have terminated favourably to the party complaining of them, if it is to be extended beyond the case of an action for malicious prosecution, can apply only where the parties are the same, and the proceedings are not ex parte; its only object being to avoid the existence at the same time of incongruous judgments between the same parties in a matter twice litigated between them.

Montague Smith, for the defendants. It appears from the declaration that the proceedings in the *French Court* were in rem; and it must be assumed, until the contrary is shewn, that all the proper parties had notice of them; for it cannot be supposed that the Court would act in a manner contrary to natural justice. The presumption

(a) *Carth.* 3.

(b) *Salk.* 13.

omnia rite esse acta applies; if there was any irregularity, it lies upon the plaintiff to aver it, and to shew some ground for impeaching the judgment. [*Blackburn J.* It may not be necessary for the plaintiff to impeach the judgment. He may say that he has a good cause of action against the defendants for wrongfully and improperly doing that which has resulted in a valid judgment in rem to his detriment.] If the judgment is valid, the plaintiff can have no cause of action until it is reversed; his proper course was to appeal against it in the regular course of procedure of the Courts in which the proceedings were brought. The leading authority that a judgment in rem is, while it stands, conclusive on all the world, is *Hughes v. Cornelius* (a), in which the judgment of a foreign Admiralty Court adjudging a ship lawful prize was held conclusive; and, though erroneous in fact, binding on the owner, so as to prevent him, while it remained unreversed, from recovering the ship in this country. In *Vanderbergh v. Blake* (b), which was an action for falsely and maliciously procuring a sentence of forfeiture of the plaintiffs' goods as being the goods of aliens, whereas the defendant knew the plaintiffs to be the owners of the goods and to be denizens, Lord Hale C. B. made some observations very much in point in the present case. He said: "It deserves consideration whether an action lies at all, as this case is, or not: for here the goods are condemned as forfeited by judgment of the Court; and the party might have prevented that by coming in before judgment upon proclamation and claiming property; and if such an action should be allowed, the judgment would

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(a) 2 *Show.* 232.(b) *Hardr.* 194. 195.

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be blown off by a side wind : and so in other actions ; as if a man be convicted of perjury, an action upon the case lies not, though the prosecution were malicious. It has been a great doubt in this Court whether an action of trover lies after such a condemnation, and adjudged at last that it does not. But if a particular person had come in, and claimed property, and lost them, yet the true proprietor might have an action of trover, because he was no party to the former suit ; but here upon a condemnation after proclamation, it is otherwise." In *Whitworth v. Hall* (a) it was held that, in an action for maliciously suing out a commission of bankruptcy against the plaintiff, it must be averred and proved that the commission was superseded before the commencement of the action : and that, if this fact be not proved, the plaintiff ought to be nonsuited, though the fact be not averred in the declaration, and though the defendant, who might have demurred for the omission, has not done so ; Lord *Tenterden* C. J., in giving judgment, saying: "If a commission of bankrupt be sued out without any reasonable or probable cause, we must assume that the Lord Chancellor would supersede it." In *Steward v. Gromett* (b) the Court affirmed the general rule that the plaintiff must shew a termination in his favour of the proceedings the institution of which is his ground of complaint ; but considered the particular instance an exception. In *Farley v. Danks* (c), which was an action for falsely and maliciously procuring the plaintiff to be adjudged a bankrupt, the adjudication was annulled before action brought. *Revis v. Smith* (d) in no way supports the plaintiff's contention. Col-

(a) 2 B. & Ad. 695.

(b) 7 C. B. N. S. 191.

(c) 4 E. & B. 493.

(d) 18 C. B. 126.

lins v. Cave (a) shews that it is not actionable to have fraudulently induced a third person to bring a wrongful action against the plaintiff; at all events, if it appears that that action terminated unfavourably to him. So, *Cotterell v. Jones* (b) decides that no action lies for a conspiracy falsely and maliciously and without any reasonable or probable cause to commence and prosecute an action, in the name of a third person, against the plaintiff, without an allegation shewing that legal damage has been sustained thereby. *Haddan v. Lott* (c) is a further authority that special damage, the immediate result of the wrong complained of, must be averred in a declaration for falsely, maliciously and without reasonable and probable cause, procuring a third person to do the plaintiff an injury. The instances given in *Com. Dig. Action upon the Case for Conspiracy* (A); *Action upon the Case for a Deceit* (A 4.); *Fitzherbert De Nat. Brev. tit. Writ of Conspiracy*, 116 E; shew that a plaintiff who complains that he has been injured by a conspiracy to set the law in motion against him must shew either that the proceedings of which he complains were set aside before writ brought, or that they terminated in his favour. In the last case bearing on the subject, *Barber v. Lesiter* (d), *Erle C. J.* says: "The declaration is partly for conspiracy and partly for overt acts, amongst which there might possibly be some which might indirectly have led to the charge against the plaintiff. If the declaration did amount to a charge that the defendant did some act which directly caused the plaintiff to be prosecuted for illicit distillation,

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(a) 4 H. & N. 225.

(b) 11 C. B. 713.

(c) 15 C. B. 411.

(d) 7 C. B. N. S. 175. 187.

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Holl, in reply. A judgment in rem is conclusive as an estoppel only on the point adjudicated upon. In the present case, therefore, the judgment of the *French* Court is conclusive only as to the status of the ship, but is no bar to this action. In 2 *Taylor on Evidence*, § 1490, the author says: "Though a judgment in rem is" "binding upon all the world as to the precise point directly decided, and consequently the decision cannot be impeached in the same or another Court, by shewing that the facts on which it immediately rests are false;—yet, when these facts are themselves put directly in issue in a subsequent suit, the judgment does not" "furnish conclusive evidence of their truth, however necessary it may have been for the Court proceeding in rem, to have determined that question before it adjudicated upon the principal point." *Dalglish v. Hodgson* (a) and *Fisher v. Ogle* (b) shew that the ground upon which a foreign judgment in rem proceeded may be contested in an *English* Court of law, if that ground does not appear clearly on the face of the judgment. The authorities already cited shew, further, that a judgment in rem may be impeached, if it be obtained by fraud. In *Cotterell v. Jones* (c) and *Haddan v. Lott* (d) the actions failed,

(a) 7 *Bing.* 495.

(b) 1 *Compb.* 418.

(c) 11 *C. B.* 713.

(d) 15 *C. B.* 411.

because it was not sufficiently alleged that the plaintiffs had sustained legal damage; and *Collins v. Cave* (a) was decided mainly on the ground that the damage sustained was too remote a consequence of the defendant's wrongful act.

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Cur. adv. vult.

CROMPTON J. now delivered the judgment of the Court. In this case the demurrer to the declaration raises a question of some difficulty. There is no doubt, on principle and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage; *Cotterell v. Jones* (b), *Barber v. Lesiter* (c). But in such an action it is essential to shew that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination. The reason seems to be that if, in the proceeding complained of, the decision was against the plaintiff and was still unreversed, it would not be consistent with the principle on which law is administered for another Court, not being a Court of appeal, to hold that the decision was come to without reasonable and probable cause. In the present case the proceedings were not instituted in the Courts of this country, but they are stated to be proceedings in rem in the Courts of *France*. There is no direct authority on the point; but it seems to us that the same principle

(a) 4 H. & N. 225.

(b) 11 C. B. 713.

(c) 7 C. B. N. S. 175.

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which makes it objectionable to entertain a suit grounded on the assumption that the unreversed decision of a Court in this country was come to without reasonable and probable cause, applies where the judgment, though in a foreign country, is one of a Court of competent jurisdiction, and come to under such circumstances as to be binding in this country. A judgment in rem is, as a general rule, conclusive everywhere, and on every one; and we do not think that the averments in the declaration shew that this judgment in rem was obtained under such circumstances as to be impeachable by the present plaintiff. It is averred, and we must on the demurrer assume that it is truly averred, that by the law of *France* the judgment in rem can only be obtained if the holder of the bill of exchange be a *French* subject, and bonâ fide holds for value; and we must take it as admitted on this demurrer that *Troteaux*, the *French* holder of the bill of exchange, by the fraudulent procurement of the defendants falsely represented to the *French* Court that he was holder for value, when he was not. It is not necessary to say what would be the effect if it were stated that, by the contrivance of the defendants, the proceedings were such that the plaintiff had no opportunity to appear in the *French* Court and dispute the allegations. In the present case it is quite consistent with the averments in the declaration that the plaintiff had notice of the proceedings in *France* and purposely allowed judgment to go by default, or even that he appeared in the *French* Court, intervened, and was heard, and that the very question whether *Troteaux* was a holder for value was there decided against him. We think, on the principle laid down in

Bank of Australasia v. Nias (a), that the plaintiff cannot impeach the judgment here on such grounds, and that whilst it stands unreversed this action cannot be maintained. The declaration being thus, in our opinion, bad, and the defendants therefore entitled to our judgment, it is unnecessary to consider the sufficiency of the pleas.

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Judgment for the defendants.

(a) 16 Q. B. 717.

MEMORANDA.

In this Vacation a patent of precedence was granted to *George Hayes*, Serjeant at law, to have place and precedence at the Bar next after *Archibald John Stephens*, Esq., one of Her Majesty's Counsel.

In the same Vacation the following gentlemen were appointed Queen's Counsel.

William Dugmore, Esq., of *Lincoln's Inn*.

William Anthony Collins, Esq., of *Lincoln's Inn*.

Anthony Cleasby, Esq., of the *Inner Temple*.

Henry Warwick Cole, Esq., of the *Inner Temple*.

John Fraser Macqueen, Esq., of *Lincoln's Inn*.

Thomas Chambers, Esq., of the *Middle Temple*.

Edwin Plumer Price, Esq., of the *Inner Temple*.

Josiah William Smith, Esq., of *Lincoln's Inn*.

Richard Baggallay, Esq., of *Lincoln's Inn*.

Henry Mills, Esq., of the *Middle Temple*.

The Hon. *Adolphus Frederick Octavius Liddell*, of the *Inner Temple*.

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MEMORANDA.*William Batiol Brett, Esq., of Lincoln's Inn.**John Burgess Karlake, Esq., of the Middle Temple.**William Digby Seymour, Esq., of the Middle Temple.**John Duke Coleridge, Esq., of the Middle Temple.**The Hon. George Denman, of Lincoln's Inn.**George Mellish, Esq., of the Inner Temple.*

And *Thomas Wheeler, Esq., of the Middle Temple,*
was called to the degree of the coif. He gave rings
with the motto "Non sine labore."

END OF HILARY VACATION.

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halves; the payment being, until then, inchoate and conditional. It is therefore open to the sender, at any time before sending the second halves, to disaffirm the transaction and redemand the first halves from the receiver, who is liable to an action for refusing to return them. *Smith v. Mundy*, 22.

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The examination of defendant, a bankrupt, commenced on 6th November, and was adjourned to 3rd December, 1860. On 29th November the bankruptcy Commissioner, at the instance of O., a creditor of defendant, who had proved his debt, issued a certificate, under The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. s. 257., Schedule B a, withdrawing protection from defendant. O. sued out of the Court of Exchequer a ca. sa. upon this certificate, under which the sheriff arrested defendant on 1st December. In January, 1861, defendant being still in custody under that ca. sa., the Commissioner granted plaintiff, also a creditor, a similar certificate, under which a ca. sa., sued out of this Court, was in the same month lodged with the sheriff, as a detainer against defendant.

Held, discharging a rule calling on plaintiff to shew cause why defendant should not be discharged from custody as to this last ca. sa., that defendant was legally detained in custody under it. That, assuming that stat. 12 & 13 Vict. c. 106. s. 112. gives a bankrupt an absolute statutory protection from arrest till the day fixed for his final

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examination, so that the original arrest of defendant was illegal, the detainer lodged by plaintiff was nevertheless good, not having been lodged until after defendant's privilege from arrest had ceased. That the principle applicable to such cases is, that whenever an arrest by a detaining party would have been good, a detainer by him, being equivalent to an arrest, will be good also, unless it appears that the first arrest was a wrongful act of the sheriff himself, or that there was some collusion between the detaining party and the creditor making the arrest, or between the detaining party and the sheriff. *Bateman v. Freston*, 578.

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Stat. 17 & 18 Vict. c. 36. s. 1. enacts that every bill of sale of personal chattels shall be filed "within twenty-one days after the making or giving of such bill of sale," "otherwise such bill of sale shall," "as against all sheriff's officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of law or equity authorizing the

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seizure of the goods of the person by whom" "such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time" "of executing such process," "and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale."

Held that, under this enactment, the assignee of goods assigned by a bill of sale has twenty-one days from the date of the bill of sale, within which he may either file the bill of sale or take the goods out of the apparent possession of the assignor. That, therefore, the title of such assignee to the goods is not defeated by their seizure, while in the apparent possession of the assignor but before the twenty-one days have expired, under a fi. fa. issued against the goods of the assignor by an execution creditor. *Marples v. Hartley*, 610.

2. What is a sufficient description of the residence and occupation of assignor. *Falsa demonstratio*.

Stat. 17 & 18 Vict. c. 36. s. 1. requires a description of the residence and occupation of the person making a bill of sale of personal chattels to be filed with every such bill of sale; in order to the validity of the bill of sale as against creditors of that person.

G. & H., printers carrying on business in copartnership in *New Street, Blackfriars*, in the city of *London*, but not sleeping there, having made a bill of sale of the partnership goods, the description filed with the bill stated that they were printers and copartners, residing at *New Street, Blackfriars*, in the county of *Middlesex*.

Held that the description was sufficient, and the bill of sale valid: for that no creditor of G. & H. could have been misled as to their identity with the persons described, had the description merely specified *New Street*,

Blackfriars, as their place of residence; and that the erroneous addition, "in the county of *Middlesex*," instead of "in the city of *London*," was only falsa demonstratio.

Held, further, that *New Street, Blackfriars*, was the residence of *G. & H.* within the meaning of the statute. *Hewer v. Cox*, 428.

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A canal Act, 16 G. 3. c. xxviii., provided that no owner of any mines should carry on any work for the getting of coal or minerals within the distance of twelve yards from the canal, nor should any coals or other minerals be got under any part of the canal, or the towing paths thereunto belonging, or under any reservoir to be made by the canal Company, or within or under any land or ground lying within the distance of twelve yards of either side of the canal, or of any reservoir, except as thereafter mentioned, without the consent of the Company.

By another clause it was provided, that when the owner of any coal mine &c. lying under the canal or reservoirs, or within the distance therein-

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before limited, should be desirous of working the same, then such owner should give a written notice of his intention to the Company three calendar months before he should begin to work such mines lying as aforesaid; and upon the receipt of such notice it should be lawful for the Company to inspect such mines, in order to determine what coal or other minerals might be come at and be actually gotten; and if the Company should neglect to inspect such mines within thirty days after the receipt of such notice, it should be lawful for the proprietors of such mines, and they were thereby authorized, to work such part of the said mines as lay under the canal or reservoirs, or within the distance aforesaid; and if upon inspection the Company should refuse to permit the owners of the said mines to work such part of the said mines lying as aforesaid, or any part thereof, as they might have come at and actually gotten, then the Company should, within three calendar months, pay to the owners the value thereof.

By another clause it was provided, that nothing in the Act contained should defeat, prejudice, or affect the right of any owner of lands or grounds in, upon, or through which the canal &c. should be made, to the mines lying within or under the lands or grounds to be set out and made use of for such canal &c.; but all such mines were thereby reserved to such owners respectively; and it was declared that it should be lawful for such owners, subject to the conditions therein contained, to work all such mines: Provided that in working such mines no injury were done to the said navigation.

The owner of a coal mine gave the statutory notice to the Company of his intention to work it under and within twelve yards' distance of one of the Company's reservoirs. The Company did not thereupon either inspect the mine, or refuse to permit it to be worked, or pay the owner the value of it.

Held, that the mine owner, after the expiration of the time limited by

the Act for the Company to take those steps, was entitled, notwithstanding the proviso to the last mentioned clause, to work the mine under the reservoir in the usual and ordinary mode; and that no action lay against him by the Company for damage caused to the reservoir by reason of such working. *Stourbridge Navigation Company v. Earl of Dudley*, 409.

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The charter of *The Saddlers' Company* empowered the Wardens, or Keepers, and Assistants of the Company to elect Assistants from the Livery; such Assistants to take specified oaths before admission to the exercise of their office. It made the Assistants removable from office by the electing body, for ill government, ill conduct, or any other just and reasonable cause. It imposed certain general restrictions on the eligibility of the members of the Livery as Assistants, and declared that all elections contrary to its directions and restrictions should be void. It then gave power to the Wardens &c. to make such bye-laws as should seem to them salutary, honourable and necessary for the good government of the Company, its members and officers.

By the usage of the Company, persons elected Assistants were eligible to further offices in a routine ending with the office of Warden. The Assistants did not receive or take charge of the Company's funds: but the Renter Warden (whose office was the

first in order to which an Assistant was eligible) did, being in fact the treasurer. The Wardens &c., in 1799, duly made a bye-law "That no person who has been a bankrupt or become otherwise insolvent, shall hereafter be admitted a member of the Court of Assistants of this Company, unless it be proved to the satisfaction of the Court that such person, after his bankruptcy or insolvency, has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honourable character for seven years subsequent to such his bankruptcy or insolvency, to the satisfaction of the Court or the majority of them."

D., a member of the Livery, but in insolvent circumstances, was elected, in manner pursuant to the charter, an Assistant of the Company. Afterwards, before he knew of his election and before his admission to the office, he made a representation to the clerk of the Company, false to his own knowledge, that he was solvent. He was then sworn in and admitted, and acted in the office. Being afterwards adjudged bankrupt, and his false representation of his circumstances having been communicated by the clerk to the Wardens &c. of the Company, the latter, at a meeting duly held, but of which they gave *D.*, and of which he had, no notice, removed him from his office.

These facts having been found by special verdict, at the trial of issues raised on a mandamus commanding the Wardens &c. of the Company to restore *D.* to the office: Held, that *D.* was entitled to a peremptory mandamus, both on the ground that the bye-law of 1799 was bad, first, as imposing an unreasonable disqualification on eligibility to the office; and, secondly, as limiting the disqualification imposed to admission, instead of extending it to election, to the office; and also on the ground that, assuming *D.*'s misrepresentation to have amounted to a corporate offence, which would justify his amotion, he could not be removed without notice and without being heard; nor could his title to the office be tried by a

proceeding other than a quo warranto.

Judgment reversed in the Exchequer Chamber; where held that the bye-law was good in substance; for that the disqualification of a bankrupt or insolvent for office in the Company was not unreasonable, having regard to the nature and constitution of the Company; and that the disqualification did not violate the charter by unduly restricting the class from which the Assistants were eligible. Held, further, that the bye-law was good in form; for that, properly construed, it invalidated the election, no less than the admission, of a disqualified person. Held lastly, that granting that *D.*, if in his office, could not have been removed unheard from it for a corporate offence, the facts that he was from the beginning disqualified by the bye-law for the office, and that he procured his admittance to it by fraud, shewed that he never was properly in, and had no right to be restored to, it. *Regina v. Saddlers' Company*, 42.

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1 & 2 W. 4. c. 38. s. 16.; 6 & 7 Vict. c. 37. ss. 15. 17.; 19 & 20 Vict. c. 104. ss. 11. 14. Who to elect churchwardens in a district constituted under stat. 1 & 2 W. 4. c. 38., and in which the Bishop has under the Marriages Act, 6 & 7 W. 4. c. 85. s. 26., licensed the solemnization of marriages.

CHURCH BUILDING &c. ACTS.

By stat. 1 & 2 W. 4. c. 38. s. 16., two churchwardens are to be appointed for every church or chapel built under the provisions of that Act; one by the incumbent, and the other by the renters of pews.

The Marriages Act, 6 & 7 W. 4. c. 85. by sect. 26, empowers the Bishop of a diocese, by license under his hand and seal, to authorize the solemnization of marriages in a district chapel, for persons residing within the district. By sect. 32 the Bishop may, with the consent of the Archbishop of the province, revoke this license.

Stat. 6 & 7 Vict. c. 37. s. 15. enacts that when any church or chapel shall be built in any district, and consecrated as the church or chapel of such district, the district shall, from and after such consecration, be and be deemed to be a new parish for ecclesiastical purposes. And, by sect. 17, in every such case of a district so becoming a new parish, two churchwardens are to be chosen for it; one by the perpetual curate of the new parish and the other by the resident inhabitants having a similar qualification to that which would entitle inhabitants to vote at the election of churchwardens for the principal parish.

Stat. 19 & 20 Vict. c. 104., by sect. 11, empowers the Ecclesiastical Commissioners, upon the application of the incumbent of a district church or chapel, with the written consent of the Bishop of the diocese, to make an order under their seal, authorising the publication of banns of matrimony and the solemnization therein of marriages, baptisms, churchings, and burials; all the fees for the performance of which offices are to be payable and to be paid to the incumbent. And by sect. 14, whosoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms, are authorised to be published or performed in any consecrated district church or chapel, such district not being at the time of the passing of that Act (1856) a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is, by such autho-

rity, entitled for his own benefit to the entire fees for the performance of such offices, without any reservations thereout, such district shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated by stat. 6 & 7 Vict. c. 37. s. 15.; the church of the district shall be the church of such parish; and all the provisions of stat. 6 & 7 Vict. c. 37., relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if it had become a new parish under the provisions of that Act.

The church of C. was built, and had a district assigned to it, under stat. 1 & 2 W. 4. c. 38. In the year 1840 the Bishop of the diocese granted, under stat. 6 & 7 W. 4. c. 85. s. 26., his license for the publication of banns and the solemnization of marriages in the church, and for taking the same fees in respect thereof as were taken in the mother church by the minister and incumbent thereof for the time being; to which the fees for churchings, baptisms and burials were afterwards added. From the consecration of the church down to the issuing of the writ of mandamus in the present case, two churchwardens were chosen for the church in the manner directed by stat. 1 & 2 W. 4. c. 38. s. 16.; one by the incumbent, and the other by the pew renters.

Upon demurrer to the return to a mandamus to the incumbent of the district to convene a meeting of the inhabitants to elect a churchwarden, the return alleging that the incumbent and the pew renters had the privilege of electing the churchwardens and that stats. 6 & 7 Vict. c. 37. s. 15. and 19 & 20 Vict. c. 104. s. 14. were inapplicable: Held, that the return was good. That the authority contemplated by stat. 19 & 20 Vict. c. 104. s. 14. was not a revocable license by the Bishop, but an authority under an order of the Commissioners under sect. 11 of that Act; and that therefore the district

was not brought within the operation of stat. 19 & 20 Vict. c. 104. s. 14.

Seemle, that stat. 6 & 7 Vict. c. 37. s. 15. is inapplicable to the case of a district constituted, not under that Act, but under stat. 1 & 2 W. 4. c. 38., with a license by the Bishop under stat. 6 & 7 W. 4. c. 85. *Regina v. Perry*, 640.

CHURCHWARDENS.

Election of, in districts formed out of parishes, 640. *Church Building and Parishes Formation Acts*.

COMMON LAW PROCEDURE ACT, 1854.

(17 & 18 VICT. c. 125.)

Sect. 58. Extent of jurisdiction of Court or Judge, in making order for inspection of real property.

The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. s. 58., enacts that "either party" to an action "shall be at liberty to apply to the Court or a Judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property the inspection of which may be material to the proper determination of the question in dispute; and it shall be lawful for the Court, or a Judge, if they or he think fit, to make such rule or order, upon such terms as to costs and otherwise as such Court or Judge may direct."

Held, that this section gives, as ancillary to the power to order inspection, the same power to order the removal of obstructions, with a view to inspection, which is exercised by the Courts of equity as ancillary to their power of ordering inspection.

Plaintiff and defendants were adjacent mine owners. Plaintiff having reason to believe that defendants had encroached upon his mine, obtained permission from them to make an inspection of their mine, when he found a recently erected wall at the boundary between the two mines, which prevented him from ascertaining whether defendants had en-

croached upon his mine or not. Application by him to defendants for permission to take down a portion of this wall in order to complete the inspection having been refused, plaintiff applied to a Judge at Chambers, under the above section, for an order for inspection. The Judge, upon being satisfied that a portion of defendants' wall could be safely removed, and an inspection behind it made without danger to life, and with no further detriment to defendants than a temporary suspension of their works, made an order that plaintiff should inspect defendants' mine at and behind the wall, and should be at liberty, so far as was necessary for the purpose of the inspection, to make a driftway through the wall; before making the inspection giving security to the satisfaction of the master to the extent of 500*l.*, or depositing that sum with the master, to abide any order the Court might make as to indemnifying defendants from any loss or damage they might sustain in consequence of the inspection.

Held, refusing a motion on behalf of defendants for a rule calling on plaintiff to shew cause why this order should not be set aside, that the order was good, and not in excess of the Judge's jurisdiction under the statute. *Bennett v. Griffiths*, 467.

COMPANY.

I. Empowered by statute to take tolls in return for a public service, when not bound to exact uniform toll from all persons, 365. *Toll*, II.

II. Railway.

1. Deductions allowable to, from rateable value of line to poor rate, 392. *Rate*, I. 1. iv.
2. Rateable value to poor rate of railway station used by two Companies, 450. *Rate*, I. 1. v.
3. Liability of, to action for false imprisonment. What sufficient evidence of authority by, to their officers, to arrest passenger for travelling without having paid his fare.

COMPANY.

Railways Clauses Act, 1845, 8 *Vict.* c. 20. ss. 103. 104.

A railway Company, though it be a corporation, is liable in an action for false imprisonment, if that imprisonment be committed by its authority. Such authority need not be under seal; but it lies upon the plaintiff to give evidence justifying the jury in finding that the persons actually imprisoning him, or some of them, had authority from the Company to do so.

The Railways Clauses Act, 1845, 8 *Vict.* c. 20., by sects. 103, 104, imposes a penalty on any person travelling on a railway without having paid his fare, with intent to avoid payment thereof; and empowers all officers and servants on behalf of the Company to apprehend such person until he can conveniently be taken before a justice.

Held that, inasmuch as the exigency of deciding whether or not a particular passenger shall be arrested by a railway Company's servants under this statute must be naturally expected to arise frequently in the ordinary course of the Company's business, and is of such a nature that the decision must be made promptly on the Company's behalf, it is a reasonable inference that the Company have on the spot, at their stations, officers with authority to make the decision promptly for them.

In an action against a railway Company for the false imprisonment of plaintiff on an unfounded charge under the statute, the evidence for plaintiff showed that he, having travelled on defendants' line with a return ticket from *L.* to *W.* and back, at the end of the return journey gave up to defendants' ticket collector at the *L.* station the return half of another ticket which had then expired, and which he had put in his pocket by mistake for the right one. The ticket collector thereupon took him to the ticket office, where he explained the mistake. Thence the collector took him to defendants' paid inspector of police at the station, and the collector and inspector thence took him to the office, also at the station, of the superintendent of the line, who, refusing to accept plaintiff's explanation, said to the

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inspector, "I think you had better take him, but first you had better obtain the concurrence of the secretary." The inspector thereupon left, but returned shortly afterwards (whether or not having obtained the secretary's concurrence did not appear), when he directed a police constable, also in defendants' pay, to take plaintiff before a magistrate on the charge. The constable did so, and the magistrate, plaintiff's story proving true, dismissed the complaint. Held, that the conduct of all defendants' other officers, in referring to the superintendent of the line as the superior authority, was sufficient evidence to go to the jury that he was an officer having authority to act for defendants in arresting plaintiff. *Goff v. Great Northern Railway Company*, 672.

- III. City. Construction of charter and bye-law of, 42. *Charter*.

CONTRACT.

- I. For partnership in freight. Liability of one partner to the other for demurrage, 203. *Ship and Shipping*, II.

- II. Admissibility of parol evidence to explain written, 306. *Evidence*, I. 3.

CONVICTION.

- For gaming, Liability of innkeeper to, 1. *Gaming*.

CORONER.

What inquests he may not hold.

1. Inquest on cause of a fire by which no death is occasioned. Prohibition lies to a criminal Court.

A coroner has no ex officio jurisdiction, at common law, to hold any other inquest than one on a dead body, *super visum corporis*. He cannot, therefore, hold an inquest to inquire into the origin of a fire by which no death has been occasioned.

Prohibition lies to a Court of criminal, no less than to one of civil, jurisdiction. *Regina v. Herford*, 115.

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2. Second inquest, *mero motu*, on a body on which inquest has been already held *super visum corporis*, and verdict recorded. .

A coroner has no power, after holding an inquest *super visum corporis* and recording the verdict, to hold a second like inquest, *mero motu*, on the same body; the first not having been quashed, and no writ of *melius inquirendum* having been awarded. *Regina v. White*; 137.

CORRUPT PRACTICES AT ELECTIONS ACT.

(15 & 16 VICT. c. 57.)

Evidence, I. 1. ii.

COSTS.

- I. Right of defendant to, where plaintiff is nonsuited. Stat. 4 *Jac.* 1. c. 3. s. 2. Nonsuit of mortgagee of turnpike tolls, in ejectment by him to recover the toll-gates. Stat. 3 G. 4. c. 126. ss. 48, 74. Effect, on defendants' right to costs, of defence by one of them as landlord, *quà* turnpike trustee.

Stat. 4 *Jac.* 1. c. 3. s. 2. enacts, that "In any action" "of trespass or ejectione firmæ, or any other action whatsoever, wherein the plaintiff" "might have costs (if in case judgment should be given for him)," if "the plaintiff" "after appearance of the defendant" "be nonsuited," "the defendant" "shall have judgment to recover his costs against every such plaintiff."

The General Turnpike Act, 3 G. 4. c. 126., by sect. 48 imposes a penalty upon a mortgagee of tolls who shall keep possession of the toll-gates and receive the tolls, after he has been satisfied the mortgage debt, with interest and costs. Sect. 74 directs that some one of the trustees of a turnpike road, or the clerk to such trustees, may be sued instead of the trustees; with a proviso that every such defendant shall be reimbursed, out of the turnpike funds, all such costs, charges and expenses as he

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shall be put to or become chargeable with or liable to, by reason of his being so made defendant.

Plaintiff, executor of a mortgagee of turnpike tolls, brought ejectment to recover the toll-gates; making the keepers of the toll-gates defendants to the writ. *J.*, a trustee of the road, thereupon obtained leave to defend as landlord. Plaintiff was nonsuited, and defendants signed judgment for their costs, and took plaintiff in execution on a ca. sa.

Held, discharging a rule obtained by plaintiff to set aside the judgment and execution, that defendants were entitled to their costs. That, assuming that stat. 4 *Jac.* 1. c. 3. s. 2. makes it a condition to a defendant's right to costs, when the plaintiff is nonsuited, that the plaintiff, if successful, would, in the particular action, have been entitled to costs, the case was within the statute; sect. 48 of stat. 3 *G.* 4. c. 126., implying that plaintiff, if successful, would have recovered his costs, even if *J.* would, by sect. 74, have been exempted from personal liability to pay them; and, *J.*'s co-defendants not being, in any view of the case, exempt from such liability.

Quere, whether stat. 4 *Jac.* 1. c. 3. s. 2. does not give costs to defendants, where plaintiffs are nonsuited, in all actions in which, in general, successful plaintiffs would be entitled to costs.

Quere, also, whether, had plaintiff succeeded, *J.* would have been exempted, by stat. 3 *G.* 4. c. 126. s. 74. from personal liability to pay plaintiff's costs. *Cobbett v. Wheeler*, 358.

- II. Of Chancery suit by third person against plaintiff, in consequence of fraud on plaintiff by defendant; recoverable in action for such fraud; 537. *Trade Mark*.

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Obligation of all persons to give evi-

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dence before committee of justices appointed to prepare basis for. Stat. 15 & 16 *Vict.* c. 81. ss. 2. 7. 8.; 501. *Statute, Construction of*.

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Place of custody of offender sentenced by, in *India*, how changed, 338. *Habeas Corpus*, II.

DAMAGES.

In action for fraudulently procuring plaintiff unknowingly to counterfeit a third person's trade mark, 537. *Trade Mark*.

DEMURRAGE.

Liability to, of shipper of goods, to person with whom he has contracted for partnership in freight, 203. *Ship and Shipping*, II.

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Of debtor originally arrested under invalid ca. sa., 578. *Bankrupt and Insolvent*, II.

DISTRESS.

- I. For rent. *Landlord and Tenant*, 2.
II. For rate. *Rate*, I. 2.

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- I. Inspection of, 602. *Practice*, II.
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- I. Of Member of Parliament. Evidence at inquiry into corrupt practices at, 658. *Evidence*, I. 1. ii.
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Proceedings before justices to recover possession of, under Inclosure Acts, 7. *Inclosure Acts.*

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I. Admissibility of.

1. Documentary.

i. Of registration of *British* ship under Merchant Shipping Act, 1854, 178. *Merchant Shipping Act*, 1854.

ii. Document referred to by witness when under examination by Commissioners appointed under Corrupt Practices at Elections Act, 15 & 16 *Vict. c. 57.*, as then existing. Its admissibility against him in subsequent proceedings. Secondary evidence of document privileged from production. (Per *Hill J.*)

The Corrupt Practices at Elections Act, 15 & 16 *Vict. c. 57. s. 8.*, requires all persons summoned to give evidence before Commissioners appointed to inquire into such practices to attend the Commissioners and answer all questions put by them, and produce all books and documents bearing on the inquiry. "Provided always, that no statement made by any person in answer to any question put by such Commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal."

Held that, notwithstanding this proviso, a document already in existence before the time at which a witness is examined before the Commissioners, and referred to by him in the course of that examination, is admissible in evidence against him in subsequent proceedings, other than the

specified indictment for perjury, if it be otherwise admissible, and be proved by independent evidence aliunde.

Per *Hill J.* Assuming that such a document, if communicated by the witness to the Commissioners under compulsion, is privileged from production in the subsequent proceedings, independent secondary evidence of its contents is then admissible. *Regina v. Leatham*, 658.

2. Secondary.

Of document privileged from production (per *Hill J.*), 658. *Evidence*, I. 1. ii.

3. Oral.

Of usage of trade or business, to explain term of art in written contract.

Plaintiff, a builder, by deed contracted with defendants to build for them a house and premises for a certain sum. The deed provided that "no alterations or additions shall be admitted unless directed by the architect of" defendants "in writing under his hand, and a weekly account of the work done thereunder shall be delivered to the said architect or the clerk of the works on every *Monday* next ensuing the performance of such work; and the delivery of such account shall be a condition precedent to the right of" plaintiff "to recover payment for any such addition or alteration."

In an action by plaintiff to recover the balance due under the contract, the claim including charges for additions and alterations: Held, first, that parol evidence was admissible for plaintiff to explain that the expression "weekly account" was a term of art well known in the building trade, and meant, by the usage of the trade, an account of the day work expended in each week on the additions and alterations, and the materials used in such day work. Secondly, that mere sketches of the manner in which the extra work was to be done, prepared and furnished to plaintiff by defendants' architect, but

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not signed by him, were not directions in writing under the hand of the architect, within the meaning of the contract. *Myers v. Sari*, 306.

II. Obligation of all persons to give evidence before committee of justices appointed to prepare basis for county rate; stat. 15 & 16 *Vict. c. 81. ss. 2. 7. 8.*; 501. *Statute, Construction of.*

III. What sufficient evidence of authority from railway company to servant, to arrest passenger for travelling without having paid fare, 672. *Company*, II. 3.

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Coroner, when has not jurisdiction to hold inquest respecting cause of, 115. *Coroner*, 1.

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In rem. Its conclusiveness, till reversed, 708. *Action*, V.

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FRIENDLY SOCIETIES ACTS.

(10 G. 4. c. 56.; 18 & 19 *Vict. c. 63.*)

What disputes between a society and its members may be sued upon, and what must be settled by justices or by arbitration. 10 G. 4. c. 56. s. 27.; 18 & 19 *Vict. c. 63. ss. 1. 40.*

The Friendly Societies Act, 10 G. 4. c. 56., enacts, by sect. 27, "that provision shall be made by one or more of the rules of every such society," "specifying whether a reference of every matter in dispute between any such

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society, or any person acting under them, and any individual member thereof, or person claiming on account of any member, shall be made to "justices of the peace," "or to arbitrators." The subsequent Act, 18 & 19 *Vict. c. 63.*, which by sect. 1 repeals the former, "save and except as to any offences committed, or penalties or liabilities incurred, or bond or security given, or proceedings taken under the same, before the commencement of" the repealing Act, by sect. 40 enacts, "that every dispute between any member or members of any society established under this Act or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal."

The rules of a friendly society formed under stat. 10 G. 4. c. 56. provided that if any dispute should arise as to the legality or payment of any fine, money, or allowance, or as to the disqualification of any member at the time of his admission, or between any officer and member, it should be referred to the decision of the committee of the society, from whom there should be an appeal to justices.

Before *July*, 1855, when stat. 18 & 19 *Vict. c. 63.* came into operation, defendant, the treasurer of this society, received, as such, certain moneys, the balance of which he failed to pay over to plaintiffs, the society's trustees, and to recover which plaintiffs after that date brought this action.

Held that, whether the case was governed by stat. 10 G. 4. c. 56. or by stat. 18 & 19 *Vict. c. 63.*, the action lay: for that the plaintiffs' claim was not a dispute between the society and the defendant in his capacity as an individual member of it, which disputes alone were required by either statute to be dealt with under the society's rules, and otherwise than by action.

GAME ACT.

Held, by *Hill J.*, that stat. 18 & 19 *Vict. c. 63.* governed the case. *Sinden v. Banks*, 623.

GAME ACT.

(1 & 2 *W. 4. c. 32.*)

Sect. 4. Penalty is incurred by licensed dealer in game, who sells live birds of game at prohibited time.

Stat. 1 & 2 *W. 4. c. 32. s. 4.* imposes a penalty upon any licensed dealer in game who buys, sells, or knowingly has in his possession or control, any bird of game after the expiration of ten days from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively: and upon any person not licensed to deal in game, who buys or sells any bird of game after the expiration of the same period, or who knowingly has in his possession or control any bird of game (except birds of game kept in a mew or breeding place) after the expiration of forty days from the respective days on which the season for lawfully killing such birds ends.

Held, that throughout this section the words "birds of game" include live birds; and that a licensed dealer in game incurs the penalty by selling such birds after the expiration of the ten days specified by the statute. *Loome v. Baily*, 444.

GAMING.

Stat. 9 *G. 4. c. 61. s. 21.* and Sched. C. What amounts to gaming by an innkeeper.

Stat. 9 *G. 4. c. 61. s. 21.* imposes penalties upon an innkeeper for offences against the tenor of his license. The form of license is given in Schedule C. of the Act, and contains a proviso that the innkeeper shall "not knowingly suffer any unlawful games or any gaming whatsoever" in the licensed house and premises.

Held, that an innkeeper was liable

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to conviction, under sect. 21, for playing cards for money with private friends of his own in his own private room in the inn. *Patten v. Rhymmer*, 1.

HABEAS CORPUS.

I. Father of female child under age of sixteen is entitled to her custody, apart from her consent.

As a general rule, the father of a female child under the age of sixteen is legally entitled to her custody; and she is not of an age to exercise a discretion to withdraw herself therefrom. Persons detaining such a child from her father's protection, though with her consent, will therefore be ordered by this Court, on proceedings by habeas corpus, to give her up to her father. *Regina v. Howes*, 332.

II. Offender convicted in *India* by Court-martial, and removed thence to *English* prison to undergo sentence, when cannot be detained in *England*. Mutiny Act, 1857, ss. 1, 38, 40, 41. Articles of War. Proper prison for such offender. Change of his place of custody how far lawful, and how may be made.

By the 131st of the Articles of War drawn up in pursuance of The Mutiny Act for 1857, 20 *Vict. c. 13. s. 1.*, jurisdiction was conferred on general Courts-martial in *India* to try and sentence certain military offenders accused there of civil offences. By sect. 38 of that Act, the place of imprisonment under the sentences of general Courts-martial is to be appointed by the officer commanding the district. By sect. 40, every governor or keeper of any public prison in any part of Her Majesty's dominions is required to receive into and keep in his custody any military offender under sentence of imprisonment by a Court-martial, upon delivery to him of an order in writing in that behalf from the officer commanding the regiment to which the offender belongs, containing certain specified particulars. By sect. 41, in the case of a prisoner undergoing

imprisonment under the sentence of a Court-martial in any public prison other than the military prisons set apart by the authority of the Act, the officer commanding the district is empowered to give an order in writing, directing that the prisoner be delivered over to military custody, for the purpose of being removed to some other prison or place, there to undergo the remainder of his sentence.

A., a military offender amenable to the jurisdiction, was tried in *India*, under the above statute, by a general Court-martial, for a civil offence, of which the Court found him guilty, and for which they sentenced him to four years' imprisonment. The officer commanding the district in which he was tried appointed the Fort of *Agra* as the place of his imprisonment. It did not appear whether this fort was or was not a public prison, or was or was not a military prison set apart by the authority of the Act. It was, however, under military command. *A.* was imprisoned there for about nine months; at the end of which the same officer who had appointed it as the place of imprisonment gave an order in writing, directing that he should be removed therefrom to *England*, to undergo there the remainder of his sentence; but not mentioning any prison in *England* to which he was to be removed. *A.*, having been brought to *England* under this order, was there confined in several prisons in succession, and, ultimately, in the Queen's Prison; an order from the Commander-in-Chief of the army in *England*, directing the keeper of that prison to receive him into custody for the remainder of his sentence, being sent there with him.

Held, making absolute a rule for a habeas corpus obtained by *A.*, that *A.* was entitled to his discharge; for that his detention in custody, which could not be justified at common law, was not warranted by the Act in question; inasmuch as, assuming (a point which the Court did not determine) that the case fell within the provisions of the Act as to the removal of prisoners, no valid order for

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his detention in the Queen's Prison had been made under either sect. 40 or sect. 41. *Re Allen*, 338.

III. Jurisdiction of superior Courts of common law at *Westminster* to issue habeas corpus ad subjiciendum to all parts of the Crown dominions.

(But see now stat. 25 & 26 *Vict.* c. 20. s. 1.)

The superior Courts of common law at *Westminster* have jurisdiction at common law to issue a writ of habeas corpus ad subjiciendum to all parts of the dominions of the Crown of *England*, even to those in which an independent local judicature has been established. Such jurisdiction can be taken away only by express legislative enactment.

Accordingly, this Court granted a writ of habeas corpus directed to certain gaolers and others, in the province of *Upper Canada*, commanding them to bring up the body of *A.*, a *British* subject, alleged to be illegally in their custody. *Ex parte Anderson*, 487.

HIGHWAY.

I. General Highway Act, 5 & 6 *W.* 4. c. 50. s. 95. Justices when have not jurisdiction under, to direct indictment of parish for non repair of highway.

Stat. 5 & 6 *W.* 4. c. 50. s. 95. enacts, "that if on the hearing of" a "summons respecting the repair of any highway the duty or obligation of such repairs is denied by the surveyor" of the parish alleged to be chargeable with the repairs "on behalf of the inhabitants of the parish," "it shall then be lawful for" the "justices" in special sessions for the highways, before whom the summons is heard, "and they are hereby required, to direct a bill of indictment to be preferred" "at the next assizes" "against the inhabitants of the parish" "for suffering and permitting the said highway to be out of repair."

Held, that, although where the road alleged to be out of repair is admitted

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at the hearing to be a highway and to need repair, and only the liability to repair is disputed by the parish, this section renders it imperative on the justices to order an indictment to be preferred, they have no jurisdiction to make such an order, if it appears that the parish has already been acquitted on a similar indictment. *Ex parte Bartlett*, 253.

- II. Highway rate, how far auxiliary fund to rates levied under Nuisances Removal Act, 277. *Nuisances Removal Act*, I.

INCLOSURE ACTS.

(Stat. 8 & 9 VICT. c. 118.; 15 & 16 VICT. c. 79.)

Valuer acting in an inclosure when not entitled to apply to justices for recovery of possession of encroachment. Jurisdiction of justices. What is an ancient inclosure.

Stat. 15 & 16 VICT. c. 79. s. 13. empowers the valuer acting in the matter of an inclosure to apply to justices to recover possession of any encroachment or inclosure which, under stat. 8 & 9 VICT. c. 118., "shall be deemed to be parcel of the land subject to be inclosed," possession of which the actual occupier neglects or refuses to deliver up, after the determination of claims under that Act.

Held that, on the hearing of such an application by the valuer, the justices have jurisdiction to inquire into the circumstances attending the encroachment or inclosure in question: notwithstanding that the occupier has made no claim before the valuer or the Inclosure Commissioners, and has not appealed against the award of the Commissioners, which includes the land in dispute. That, therefore, the justices were right in refusing to order possession to be given to the valuer of a piece of land proved to have been first inclosed more than twenty years before the first meeting of the Commissioners for the examination of claims; such land being, under stat. 8 & 9 VICT. c. 118. s. 52.,

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an ancient inclosure, and that section, taken with section 50, shewing that inclosures, only, of less than such twenty years standing are, under that Act, to be deemed to be parcel of the land subject to be inclosed. *Chilcote v. Youldon*, 7.

INDIA.

Change of custody of offender convicted by Court martial in, 338. *Habeas Corpus*, II.

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Coroner's, 115, 137. *Coroner*.

INSPECTION.

- I. Of real property, under Common Law Procedure Act, 1854, s. 58, 467. *Common Law Procedure Act*, 1854.
II. Of document relied on in pleading by opposite side, 602. *Practice*, II.

INSURANCE.

Life.

Against death or injury from accident
Death from sunstroke not covered.

Defendants, a Company established "for granting assurances against loss of life and personal injury arising from accident at sea," granted a policy to *S.*, the master of a ship then about to proceed on a voyage from *England* to *Aden*; whereby it was agreed that in case *S.* "should sustain any personal injury from, or by reason, or in consequence

of, any accident which should happen to him upon any ocean, sea, river, or lake," during the continuance of the policy, defendants should pay him a reasonable compensation for such injury; and in case he should die from the effects of such injury within three calendar months from the occurrence of the accident, should pay the sum insured to his executors or administrators. It was further agreed by the policy that no compensation should be payable thereunder by defendants, either to S. or his personal representatives, in respect of injury occasioned to S. by wounds in battle or in any way by the act of the Queen's enemies; or in respect of any injury to which S. should knowingly and without some adequate motive expose himself; but it was declared that, with those exceptions, the policy was intended to secure compensation to S. or his representatives, "in the event of his sustaining any personal injury during the said intended voyage, from or by reason or in consequence of any accident whatsoever."

S. then sailed on his intended voyage, and in the course of it arrived in the *Cochin* river, on the south-west coast of *India*. Whilst on board his ship in that river, and acting as master of the ship, he was struck down by a sunstroke, to which he did not knowingly and without adequate motive expose himself, and from the effects of which he on the same day died.

In an action by S.'s administratrix on the policy to recover the sum insured from defendants; Held, that defendants were not liable: for that S.'s death could not be said to have arisen from accident, within the meaning of the policy. *Sinclair v. Maritime Passengers' Insurance Company*, 478.

JUDGMENT.

Foreign, in rem. Conclusiveness of, while unreversed, 709. *Action*, V.

JURISDICTION.

I. Of superior Courts.

1. Summary, of the Court over its attorneys. Its extent.

JURISDICTION.

The summary jurisdiction of the Court over its attorneys is not limited to cases in which they have been guilty of misconduct such as amounts to an indictable offence, or arises in the ordinary course of their professional practice; but extends to all cases of gross misconduct, on their part, in any matter in which they may, from its nature, fairly be presumed to have been employed in consequence of their professional character.

B. lent money to an attorney, whom he had previously known and employed as such, on the security of the attorney's promissory note for the amount, and of the deposit by the attorney of a deed of assignment to him of a mortgage on an estate in *Ireland*, by which a greater amount than B.'s loan was secured to the attorney. The estate getting into the *Irish Encumbered Estates Court*, the attorney borrowed the deed of B. for the purpose, as he alleged to B., of supporting his claim in that Court, but in reality in order to obtain from that Court payment of the amount secured to him by the deed. Having, by production of the deed to the Court, established his right to that payment, he returned the deed to B., and afterwards received out of Court the whole of the amount which he claimed. He never informed B. of this, but appropriated the whole amount to his own purposes, and continued for several years afterwards to pay B. interest on his loan. He then became insolvent, and B. in consequence lost the whole of the money advanced by him.

Upon these facts the Court, holding that the attorney had been guilty of gross misconduct, suspended him from practising for two years. *In re Blake*, 34.

2. Of Court or Judge in making order for inspection of real property, under Common Law Procedure Act, 1854, s. 51. *Common Law Procedure Act*, 1854.

3. Of Courts at *Westminster* to issue habeas corpus ad subjiciendum to the Colonies, 487. *Habeas Corpus*, III.

II. Of justices.

1. To inquire into circumstances attending an encroachment or inclosure, 7. *Inclosure Acts*.
2. To take cognizance of offences committed on sea shore of county, between high and low water mark.

The part of the sea shore comprised between high and low water mark forms part of the body of the adjoining county, the justices of which, and not the Admiralty, have jurisdiction to take cognizance of offences there committed, whether or not committed when the shore is covered with water. *Embleton v. Brown*, 234.

3. To direct indictment of parish for non-repair of highway, 253. *Highway*, I.
4. Of Quarter Sessions for borough, to dismiss with costs an appeal, notice of which to the County Quarter Sessions has been erroneously given, but abandoned. Stat. 12 & 13 Vict. c. 45. s. 6., 561. *Poor*, II., 3.

III. Of Coroner. *Coroner*.

- IV. Of General Medical Council to erase medical practitioner's name from register, 525. *Medical Act*.

LANDLORD AND TENANT.

Tenancy at will.

1. Creation, commencement, and determination of tenancy at will, 149. *Statute of Limitations*.
2. Right of landlord, under stat. 11 G. 2. c. 19. s. 1., to follow and seize goods fraudulently removed from premises, to prevent a distress, by tenant at will holding at fixed reserved rent.

Stat. 11 G. 2. c. 19. s. 1. enacts that "In case any tenant" "for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey

away" "from such premises, his" "goods or chattels, to prevent the landlord" "from distraining the same for arrears of rent so reserved, due, or made payable," the landlord may, within thirty days next after such fraudulent removal, follow and seize the goods as a distress for the arrears of rent due.

A., in May, 1859, entered into an agreement, not under seal, with M., by which M. agreed forthwith to grant A. a valid lease under seal of a house and premises, for three years from 25th May, 1859, at the yearly rent of 84l., payable quarterly. The agreement specified the lessor's and lessee's covenants to be contained in the lease; and it concluded as follows: "It is hereby mutually agreed that these presents shall operate as an agreement only; and that, until a lease shall be executed, the rent, covenants and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed." No lease was drawn up, but A. entered into possession, and remained till a quarter's rent became due, when he fraudulently removed his goods from the premises to prevent their being distrained.

Held that the agreement, coupled with A.'s entry into possession, made A. tenant at will to M. at a fixed reserved rent, for which M. had a right to distrain; and that, therefore, M. was entitled, under stat. 11 G. 2. c. 19. s. 1., to follow and seize A.'s goods. *Anderson v. Midland Railway Company*, 614.

LICENCE.

- I. Of innkeeper. Offence against tenor of, 1. *Gaming*.
- II. By lord of manor to inclose waste. *Statute of Limitations*.

LIEN.

Right of plaintiff to particulars of lien set up in plea, 602. *Practice*, II.

LIMITATION.

Of actions. *Statute of Limitations.*

LUNATIC.

Pauper. *Poor.*

MALICIOUS PROSECUTION.

Action, V.

MANDAMUS.

To Saddlers' Company, to restore Assistant to office, 42. *Charter.*

MARKET.

Right of market company to landing tolls in respect of use of pier adjoining the market, 365. *Toll, II.*

MASTER.

Of ship. *Ship and Shipping, III.*

MASTER AND SERVANT.

I. Masters and Servants Act, 4 G. 4. c. 34.

Sect. 3. Who is not a servant in husbandry. What is not misconduct in husbandry work.

Stat. 4 G. 4. c. 34. s. 3. enacts "That if any servant in husbandry" "shall contract with any person" "to serve him" "for any time or times whatsoever," "and" "having entered into such service shall" "be guilty of any" "misconduct or misdemeanour in the execution" of his contract, he may be convicted by justices and sent to the House of Correction, with hard labour.

Appellant was employed by respondent under a contract by the terms of which appellant was to keep the general accounts belonging to a farm of respondent, to weigh out food for cattle, to set the men to work, to lend a hand to anything if wanted, and in all things to carry out the orders of

MASTER AND SERVANT.

respondent. Appellant entered upon the employment, and, in the course of it, was ordered by respondent to go through the whole of the cattle stock under appellant's charge on the farm, and to give particulars of all the animals which had died under his care, and of all bullings and calvings which had taken place. Appellant, having refused to obey this order, was summoned before, and convicted by, justices, under the above enactment, for such refusal.

On appeal against this conviction, held that it was bad. First, because appellant was not a servant in husbandry; secondly, because, assuming that he was such a servant, he had not been guilty of any misconduct or misdemeanour in the execution of his contract to serve in that capacity. *Davies v. Lord Berwick*, 549.

II. Combination of Workmen Act, 6 G. 4. c. 129.

Sect. 3. What a threat by a workman to his employer, punishable under.

Stat. 6 G. 4. c. 129. s. 3. constitutes it an offence punishable by conviction, "by threats or intimidation, or by molesting or in any way obstructing another," to "force or endeavour to force any" "person engaged in carrying on any trade or business," "to limit" "the number or description of his" "workmen."

Held, that a threat by a workman to his employer, made in pursuance of a combination (which is illegal) between that workman and fellow-workmen to carry it out, that all the workmen so combining will immediately leave work unless the employer discharges other workmen who are then in the same service, renders such workman liable to conviction for the above offence. *Walsby v. Anney*, 516.

III. Injury to servant through negligence of master while taking part in servant's work. Liability of master and of his partner.

The principle that a servant sustaining an injury from the negligence of a fellow-servant while engaged in

the common employment cannot recover in an action against the common master, does not exempt from liability to such an action a master who himself takes part in the servant's work, and whilst so doing injures the servant through negligence.

If the master is the member of a partnership by whom the servant is employed, and the work in which he so takes part is within the scope of the common undertaking of the partnership, his co-partners are jointly liable with him for the injury thus caused to the servant by his negligence. *Ashworth v. Stanwin*, 701.

MAYOR.

Of borough. Precedence of, in the borough, 222. *Municipal Corporations Reform Acts*, 1.

MEDICAL ACT.

(21 & 22 VICT. c. 90.)

Sects. 15, 17, 26, 29, 46. Jurisdiction of general medical council, under sects. 26, 29, to erase medical practitioner's name from register.

The Medical Act, 21 & 22 Vict. c. 90., by sect. 15 enacts, that every person possessed of one or more of certain specified qualifications shall be entitled to be registered as a medical practitioner on payment of certain fees, and production to the registrar of evidence of his qualification. By sect. 17, every person who was actually practising medicine in *England* before 1st August, 1815, is entitled to be registered in like manner. By sect. 46, power is given to the General Council of Medical Education (who, by sect. 6, may delegate their powers to the Branch Council) to dispense with such provisions of the Act as they think fit, in favour of, amongst other classes of practitioners, persons acting as surgeons in the public service. Sect. 26 enacts that "no qualification shall be entered on

the register, either on the first registration or by way of addition to a registered name, unless the registrar be satisfied by the proper evidence that the person claiming is entitled to it; and any appeal from the decision of the registrar may be decided by the general council;" "and any entry which shall be proved to the satisfaction of" the council "to have been fraudulently or incorrectly made may be erased from the register by order in writing of" the council. And, by sect. 29, "if any registered medical practitioner shall be convicted" "of any felony or misdemeanour," "or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

O., a medical practitioner, was registered under sect. 46, by special order of the branch council, on his representation that he was acting as a surgeon in the public service. Subsequently the general council, after holding an inquiry of which he had due notice, and at which he attended under protest but made no defence, erased his name from the register, on the grounds, first, that it was proved to their satisfaction that the entry of it was fraudulently and incorrectly made; secondly, that they, after due inquiry, judged him to have been guilty of infamous conduct in a professional respect.

Held, discharging a rule for a mandamus to the general council to restore *O.*'s name to the register, that the council had jurisdiction under the circumstances to erase his name; both under sect. 26, the second clause of which was not limited to the case of persons registered under sects. 15 or 17, and under sect. 29, which did not make it a condition to the erasure that the infamous professional conduct of which *O.* was judged guilty should have been proved to the council to have occurred before his registration. *Regina v. General Council of Medical Education*, 525.

MERCHANT SHIPPING ACT, 1854.

(17 & 18 VICT. c. 104.)

Sects. 19, 107, 257. What proof necessary to procure conviction for offence of harbouring seamen deserting from *British* ship. Ship how proved *British*.

The sections coming under the head of "Discipline" in The Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104., have reference to *British* ships alone.

One of these, sect. 257, renders liable to a penalty "every person who wilfully harbours or secretes any seaman or apprentice who has deserted from his ship." Held that, in order to convict an offender under this section, it must be shewn that the ship deserted from is a *British* ship: and that, inasmuch as by sect. 19 "every *British* ship must be registered," "and no ship" thereby "required to be registered shall, unless registered, be recognized as a *British* ship," proof that the ship is registered must also be given, either by the production of the original register, or by an examined or certified copy of it, as required by sect. 107. *Leary v. Lloyd*, 178.

METROPOLIS LOCAL MANAGEMENT ACT.

(18 & 19 VICT. c. 120.)

Sects. 158, 159. Apportionment by District Board of expenses of executing the Act, between the parishes in the district. Discretion of Board. Principles and finality of apportionment.

By The Metropolis Management Act, 1855, 18 & 19 Vict. c. 120. s. 158., every metropolitan District Board is, by order under its seal, to require the overseers of the several parishes in the district to levy and pay over to the Board the sums which it requires for defraying the expenses of the execution of the Act; distin-

guishing, in such order, the sums required for sewerage expenses from those required for other expenses under the Act. By sect. 159, if it appears to the Board that all or part of the expenses for defraying which the order is made have been incurred for the special benefit of part, or not for the equal benefit of the whole, of the district, the order may direct the sums, or part of them, required to be levied, to be levied in the part of the district specially benefited, or may exempt any part of the district from the levy, or require a less rate to be levied thereon, as the circumstances may require; and if in the judgment of the Board an entire parish is entitled to exemption, no order need be made on such parish.

Held, that the effect of the Act is to substitute districts for the parishes of which they are composed, for all purposes of management, taxation and expenditure; not for purposes of management only. That the rates leviable in the component parishes under the orders of a District Board, are raised for the benefit of the whole district, though apportioned between the parishes. That, *prima facie*, the rates ought to be apportioned between the parishes according to their respective rateable value, and not according to the outlay in them respectively; subject to allowances, at the discretion of the Board, in cases falling within sect. 159. That an order of a District Board on a parish, distinguishing between the sums required for sewerage and for other expenses, is good under sect. 158, and is final, if made by the Board after an impartial exercise of the discretion given to it by sect. 159; the decision of the Board, so arrived at, as to the amount proper to be required from a parish, being, even if erroneous, conclusive. *Overseers of St. Botolph Aldgate v. Whitechapel Board of Works*, 89.

MINES.

Under canal. Owner when entitled to work, though he thereby damages the canal, 409. *Canal*, II.

MUNICIPAL CORPORATIONS
REFORM ACTS.(5 & 6 W. 4. c. 76. ; 7 W. 4 & 1 Vict.
c. 78.)

- I. 5 & 6 W. 4. c. 76. s. 57. Mayor of borough how far entitled to precedence in it.

The Municipal Corporations Reform Act, 5 & 6 W. 4. c. 76. s. 57., enacts "That the mayor for the time being of every borough shall be a justice of the peace of and for such borough, and shall continue to be such justice of the peace during the next succeeding year after he shall cease to be mayor;" "and such mayor shall, during the time of his mayoralty, have precedence in all places within the borough."

Held, that this section refers to social, not magisterial, precedence; and therefore does not entitle a mayor, during his mayoralty, to take precedence and to preside at all meetings of the borough justices, held in the borough, at which a chairman is required. *Ex parte Mayor of Birmingham*, 222.

- II. 7 W. 4 & 1 Vict. c. 78. s. 14. Sufficiency of description of candidate's christian name by a well-known contraction, in voting paper for election of aldermen.

Stat. 7 W. 4 & 1 Vict. c. 78. s. 14. enacts that aldermen shall be elected in boroughs by the personal delivery to the mayor or chairman at the meeting for the election, by each councillor entitled to vote, of a voting paper containing, inter alia, the christian name and surname of the persons for whom he votes.

Held, that the statute is satisfied if the voting paper contains a contraction of a christian name which is well known and in ordinary use as representing that name: and that, in such a case, the name need not be written in full. That, therefore, the contractions "*Wm.*" and "*Willm.*" may be used in a voting paper as equivalent to "*William.*" *Regina v. Bradley*, 634.

MUTINY ACT.

For 1857, 20 Vict. c. 13. ss. 1, 38, 40, 41; 338. *Habeas Corpus*, II.

NEGLIGENCE.

Injury to servant through negligence of master while working with him. Liability of master and of his partner, 701. *Master and Servant*, III.

NUISANCES REMOVAL ACT
(ENGLAND) 1855.

(18 & 19 Vict. c. 121.)

- I. Sects. 3, 7, 22. Primary liability of houses using sewer to assessment to rate for defraying expense of it, before resort by Nuisances Removal Committee to highway rates as an auxiliary fund. Certiorari when lies, though taken away by statute.

By the Nuisances Removal Act for England, 1855, 18 & 19 Vict. c. 121. s. 22., whenever any drain used for the conveyance of sewage from any house, buildings, or premises, is a nuisance, and cannot, in the opinion of the Local Authority, be rendered innocuous without the laying down of a sewer, the Local Authority are empowered and required to lay down such sewer, and are authorized and empowered to assess every house, building, or premises using the same, to such payment as they shall think just and reasonable. By sect. 3, in a place where a nuisances removal committee constitutes the Local Authority, the surveyors of highways for the time being of such place are made ex officio members of the committee. And by sect. 7, "all charges and expenses incurred by the Local Authority in executing this Act, and not recovered as by this Act provided, may be defrayed" in such a place "out of highway rates, or any fund applicable in aid or in lieu thereof."

A nuisances removal committee having, under sect. 22, laid down a sewer to render innocuous a drain constructed before the passing of the Act by the then surveyors of highways: Held, that whether or not by

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reason of sect. 7 the highway rates were available as an auxiliary fund towards defraying the expenses thus incurred, the committee were bound, before resorting to that fund, to assess in the first instance, under sect. 22, the houses, buildings and premises using the sewer.

An order of justices not warranted by the provisions of an Act of Parliament may be removed into this Court by certiorari, though the Act contains a section taking away the certiorari. *Regina v. Gosse*, 277.

II. Sect. 22. What is a house 'using' a sewer.

By The Nuisances Removal Act for England, 1855, 18 & 19 Vict. c. 121. s. 22., whenever any drain used for the conveyance of sewage from any house, buildings, or premises, is a nuisance, and cannot, in the opinion of the Local Authority, be rendered innocuous without the laying down of a sewer, the Local Authority are empowered and required to lay down such sewer, and are authorized and empowered to assess every house, building, or premises using the same, to such payment as they shall think just and reasonable.

Under this Act the parish of H. was, in the first instance, divided into four districts. The Local Authority, in 1855, constructed a sewer in one of these, in order to render a nuisance there innocuous; B.'s house, situated there, was assessed to the expense of the construction; and B. paid an agreed composition on the assessment. In 1856 the Local Authority constructed another sewer in a second district, in order to render a nuisance in that district innocuous. These two sewers brought down the sewage from the two districts into a third, in such quantities as to greatly increase a pre-existing nuisance there: in order to render which innocuous, the Local Authority, in 1859, constructed a further sewer, running through the third and fourth districts, and, upon its completion, resolved that the drainage of all four districts should form one system, the total costs of the dif-

PLEADING.

ferent works be ascertained, and the houses, &c., through all four districts, using the sewers, be equally assessed towards the expenses incurred.

Held that B.'s house, above mentioned, was liable to be re-assessed to such expenses as a house "using" the whole sewerage system, within the meaning of sect. 22. *Regina v. Bodkin*, 271.

OFFICE.

Of Assistant in Saddlers' Company. Mandamus to restore to, 42. *Charter*.

OVERSEERS.

Power of, to enforce poor rate made by predecessors. Stats. 43 *Edw. c. 2. s. 4.*; 17 G. 2. c. 38. s. 11.; 574. *Rate*, I. 2.

PARENT AND CHILD.

Habeas Corpus, I.

PARLIAMENT.

Extent of protection of witness examined before Commissioners appointed to inquire into corrupt practices at election for member of, 656. *Evidence*, I. i. ii.

PARTNERSHIP.

- I. In freight. Liability of one partner to pay demurrage to the other, 203. *Ship and Shipping*, II.
- II. Liability of partner to servant of the partnership, injured by a co-partner in course of work within scope of the partnership, 701. *Master and Servant*, III.

PAYMENT.

By halves of Bank notes, 22. *Bank Notes*.

PIER.

Landing tolls at, 365. *Toll*, II.

PLEADING.

Set off. How far and how far not pleadable to declaration by accommo-

dation acceptor of bill, after paying it, against accommodation drawer, for reimbursement of amount of bill and interest, and of costs of action by the holder against plaintiff.

Declaration that, in consideration that plaintiff would accept, for defendant's accommodation, a bill of exchange drawn by defendant on plaintiff, and would deliver the same to defendant in order that he might negotiate it for his own use, defendant promised plaintiff to indemnify and save him harmless from any consequent loss or damage. Averment, that plaintiff accepted the bill and delivered it to defendant. Breach, that defendant did not indemnify or save harmless plaintiff from loss or damage; and plaintiff, as acceptor, was obliged to and did pay *W.*, the holder, the amount of the bill and interest, and the costs of an action on the bill by *W.* against plaintiff, as acceptor; and plaintiff also incurred costs and expenses in defending and settling such action.

Pleas. 1. To so much of the declaration as relates to plaintiff's claim in respect of his payment to *W.* of the amount of the bill and interest; A set-off.

Demurrer. Joinder in demurrer.

2. To so much of plaintiff's claim as relates to the costs of the action brought by *W.* against plaintiff and the costs and expenses incurred by plaintiff in defending and settling the said action; That the whole of the said costs and expenses were incurred by plaintiff at defendant's request: concluding with a set-off.

Replication thereto. That the said costs and expenses were not, nor was any part thereof, incurred at defendant's request as alleged.

Demurrer. Joinder in demurrer.

Held, that the first plea was good, for that plaintiff's claim in respect of the amount of the bill and interest was a liquidated demand, capable of being ascertained with precision at the time of pleading; and was separable from the rest of the claim, though mixed up with it in one

count. That the second plea was bad, being pleaded to costs and expenses incurred by plaintiff, but not paid, and therefore not constituting a liquidated demand to which a set-off could be pleaded. *Crampton v. Walker*, 321.

POOR.

I. Settlement.

1. By renting a tenement.

i. Requisites to "a separate and distinct dwelling-house" within stat. 6 G. 4. c. 57. s. 2.

C. rented and occupied the ground floor of a house, consisting of a shop and two small rooms. Access to the shop and the rooms was gained by room doors opening out of a passage. This passage led through the house from the street in front to a yard at the back, and was closed by the house front door at one end and a back door at the other. *K.* rented and occupied the upper floor; access to which was gained by an outside staircase leading from the back yard. The bottom of this staircase was situated just outside the back door of the passage, and *K.* could gain it either from the rear of the house in the first instance, or by entering at the front door and passing through the passage to the rear. *C.* and *K.* each had a key of the front door, which door, and the passage, both of them used at pleasure, and they each kept clean a distinct half of the passage. Both front and back doors of the passage were kept closed at night.

Held, that the floor rented and occupied by *C.* was not "a separate and distinct dwelling house" within stat. 6 G. 4. c. 57. s. 2., and that, therefore, *C.* did not gain a settlement by renting it. *Regina v. Elswick*, 437.

ii. Settlement not gained by Wesleyan minister paying rent and taxes for house taken for him by the stewards of his circuit, who reimburse him. Stats. 6 G. 4. c. 57. s. 2.; 1 W. 4. c. 18. s. 1.; 4 & 5 W. 4. c. 76. s. 66.

By the practice of a Wesleyan congregation, certain of its members were appointed stewards for a given circuit, and were called circuit stewards. One of their duties was to take and furnish houses for their ministers officiating within the circuit. The rents of such houses were sometimes paid by the circuit stewards, and sometimes by the ministers; if by the ministers, the stewards repaid them the amount, together with the amount of the rates and taxes in respect of the houses, which were paid by the ministers in the first instance. It was the custom of the congregation to appoint a minister to officiate in a given place for one year certain, during which he could not be removed; and no minister officiated for more than three years in the same place.

At *Michaelmas*, 1832, the circuit stewards took and furnished a house at C., a place in the circuit, for a year certain, at the rent of 20*l.*, as a residence for W., who was then appointed to be minister at C. W. immediately took possession and occupied the house, as minister, till *Michaelmas*, 1835. During the three years of his occupation, W. paid the annual rent of 20*l.* for the house to the landlord: he was also in each of those years assessed to and paid the poor-rates for C. Both rent and poor-rates, however, were repaid to him by the circuit stewards.

Held, that W. did not gain a settlement in C. by renting a tenement, or by assessment to and payment of rates and taxes, under stats. 6 G. 4. c. 57. s. 2.; 1 W. 4. c. 18. s. 1.; and 4 & 5 W. 4. c. 76. s. 66. *Regina v. Overseers of Tiverton*, 555.

2. By residence.

Order of justices adjudging settlement of pauper lunatic, under stat. 16 & 17 Vict. c. 97. s. 97. Effect of sect. 102. Acquisition by unemancipated pauper lunatic of status of irremovability, under stats. 9 & 10 Vict. c. 66., 11 & 12 Vict. c. 111.

On 17th October, 1854, J. R., who was then eighteen years old and

living, unemancipated, with his father, T. R., in the parish of A. in the S. Union, was removed as a lunatic pauper to an asylum, where he had since continued. At that time both T. R. and J. R. had resided in A. for more than the five next preceding years. T. R. continued to reside there till 1857, when he left, and had not since returned.

T. R.'s settlement, both on and since 17th October, 1854, was in the parish of G. J. R. was maintained in the asylum from that date, at the cost of the S. Union, until, it being discovered that T. R. had left A., an order of justices was, on 11th October, 1859, made under stat. 16 & 17 Vict. c. 97. s. 97., adjudging J. R. to be settled in G., and ordering G. to pay the preceding twelve months' expenses of his maintenance, and a weekly sum for his future support. Sect. 102 of that Act provides that all expenses incurred for the removal, maintenance, &c. of a pauper lunatic removed to an asylum, "who would at the time of his being conveyed to such asylum" "have been exempt from removal to the parish of his settlement" "by reason of some provision in" stat. 9 & 10 Vict. c. 66., "shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption," "and where such parish shall be comprised in any Union the same shall be paid by the guardians, and be charged to the common fund of such Union;" "and no order shall be made under any provision" "in this" "Act on the parish of the settlement in respect of any such lunatic pauper."

On a case stated for this Court on an appeal to Sessions by G. against the order of 11th October, 1859: Held, that stat. 16 & 17 Vict. c. 97. s. 102. applied, and the order was therefore bad. That J. R. was, at the time of his being conveyed to the asylum, exempt from removal to G. by reason of a provision in stat. 9 & 10 Vict. c. 66. with which the amending statute 11 & 12 Vict. c. 111. was to be read as one: and had himself, though not *sui juris*, acquired

such exemption in *A. Regina v. Overseers of St. Giles*, 224.

II. Removal.

1. Exemption from removal, under stats. 9 & 10 *Vict. c. 66.* and 16 & 17 *Vict. c. 97. s. 102.*, of unemancipated pauper lunatic, 224. *Poor*, I. 2.

2. Stats. 4 & 5 *W. 4. c. 76. ss. 79, 84, 99.*; 11 & 12 *Vict. c. 43. ss. 11, 35.* Order on parish of settlement for costs of maintenance of pauper removed under order of removal. Time for laying information for such costs by relieving parish. Extent of liability of parish of settlement. Notice of chargeability.

Stat. 4 & 5 *W. 4. c. 76. s. 84.* enacts, "That the parish to which any poor person whose settlement shall be in question at the time of granting relief shall be admitted or finally adjudged to belong shall be chargeable with and liable to pay the cost " "of the " "maintenance of such poor person, and such cost " "may be recovered against such parish in the same manner as any penalties or forfeitures are by this Act recoverable:" provided that such parish shall pay to the relieving parish such cost from such time only as notice that the poor person has become chargeable shall have been sent by the relieving parish to the parish of settlement. By sect. 79 no poor person is to be removed, under an order of removal, until twenty-one days after written notice of his being chargeable has been sent by the relieving parish to the parish of settlement, have elapsed without an appeal by the latter parish against the order of removal. By sect. 99, penalties and forfeitures under the Act are made recoverable by information before justices and their order thereon, no time being limited for laying the information.

Stat. 11 & 12 *Vict. c. 43. s. 11.* enacts, "That in all cases where no time is " "specially limited for" "laying any" "information in the Act" "of Parliament relating to each particular case," "such infor-

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mation shall be laid within six calendar months from the time when the matter of such " "information " "arose." By sect. 35, "Nothing in this Act shall extend or be construed to extend to any warrant or order for the removal of any poor person who " "shall become chargeable to any parish."

An order having been made for the removal of a female pauper, written notice of her chargeability was sent by the relieving parish to the parish of settlement, which did not appeal against the order of removal. At the date of the order the pauper was pregnant, though not unable to bear removal. She so continued for some months, and was not actually removed till after her delivery, and five months after the service of the notice of chargeability. Nearly six years after her removal, the relieving parish laid an information before justices against the parish of settlement, for the cost of her maintenance from the time of the service of the notice of chargeability to that of her actual removal: and the justices made an order for the full amount.

On appeal by the parish of settlement against this order: held, First, that the relieving parish was entitled, under stat. 4 & 5 *W. 4. c. 76. ss. 79, 84* and 99, to the cost of the pauper's maintenance only for the twenty-one days next after the service of the notice of chargeability. Secondly, that the information on which the order was founded was laid too late, by reason of stat 11 & 12 *Vict. c. 43. s. 11.*; and was not within the exemption in sect. 35. *Hill v. Thorncroft*, 257.

3. Notice of appeal against order of removal, to wrong Sessions. Its validity. Jurisdiction of right Sessions, under stat. 12 & 13 *Vict. c. 45. s. 6.*, to dismiss appeal with costs, at instance of respondents, to whom appellants, who do not appear, have given notice of abandonment of the appeal to the wrong Sessions.

Overseers of a parish, on which an
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order of removal of a pauper had been made by two borough justices, gave notice of an appeal against the order to the next Quarter Sessions for the county in which the borough was situate. The borough had a separate Court of Quarter Sessions, which alone had jurisdiction to hear the appeal. The day before the Borough Sessions next after the notice of appeal were held, the appellants gave notice to the respondents that, finding that the Sessions for the county had no jurisdiction, they abandoned the appeal. The appellants did not appear, and the respondents did, at the Borough Sessions; which Court, on the application of the respondents, dismissed the appeal, and made an order for the payment by the appellants to the respondents of the costs incurred by the latter in the appeal.

Held, discharging a rule for a certiorari to bring up this order, that the order was rightly made. That the Borough Sessions would have had jurisdiction to hear the appeal, if persisted in; the erroneous statement in the notice of appeal that the appeal would be made to the County Sessions being merely surplusage; and that, upon the abandonment of the appeal, the Borough Sessions had jurisdiction under stat. 12 & 13 Vict. c. 45. s. 6. to make the order. *Regina v. Recorder of Leeds*, 561.

III. Rate. *Rate*, I.

POSSESSION.

Adverse. Statute of Limitations.

POWER OF SALE.

Vendor and Purchaser.

PRACTICE.

I. On making order, by Court or Judge, for inspection of real property, under Common Law Procedure Act, 1854, s. 58., 467. *Common Law Procedure Act*, 1854.

II. Right to inspection of document,

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and particulars of lien, relied on in pleading by other side.

Detinue for title deeds. Plea, on equitable grounds, that before the detention, and in the lifetime of *M. P.*, since deceased, through whom plaintiffs claimed, the deeds belonged to *M. P.*, who agreed with *J. N.* to deposit them with him, by way of equitable mortgage to secure the repayment of money lent by him to *M. P.* That from the time of that agreement to his death, *J. N.* held the deeds on the terms aforesaid; and died, having appointed defendants executrixes of his will, which they proved. That thereupon the deeds came into, and thence till action brought continued in, the possession of defendants as such executrixes; and that none of the money lent by *J. N.* to *M. P.* had ever been paid. That, therefore, defendants detained and detain the deeds; which was the detention in the declaration mentioned.

Plaintiffs, who were trustees of *M. P.*'s marriage settlement and also her executors, administered interrogatories to defendants, who, in answer, admitted that they had in their possession a memorandum of a specified date, signed by *M. P.*, agreeing that the deeds should remain in the custody of *J. N.* till repayment of the moneys advanced by him to *M. P.*

Held that plaintiffs, on an affidavit stating that they were entirely ignorant of the said memorandum, and had no means of ascertaining anything of its contents, and that it was material and necessary, in order to prosecute the action, that they should have inspection of it, were entitled to inspection of the memorandum, and also to be furnished by defendants with particulars of the lien or mortgage on the deeds relied upon by them. *Owen v. Nickson*, 602.

III. Change of venue in quo warranto, 147. *Venue*.

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Liability of *English* agent for foreign charterer, 495. *Ship and Shipping*, IV.

PRISON.

PRISON.

Proper, for offender sentenced by *Indian Court-martial*, 338. *Habeas Corpus*, II.

PROHIBITION.

Lies to Criminal Court, 115. *Coroner*, I.

QUARTER SESSIONS,

Jurisdiction of, to dismiss appeal, where notice of appeal to other and wrong Sessions has been given but abandoned. Stat. 12 & 13 *Vict.* c. 45. s. 6., 561. *Poor*, II. 3.

QUO WARRANTO.

Change of venue in, 147. *Venue*.

RAILWAY.

How rated to poor rate. *Rate*, I. 1. iv. v.

RATE.

I. Poor rate.

1. Principles of rateability.

- i. What principle erroneous, for ascertaining rateable value in a parish of the part of apparatus, there situate, of a waterworks Company.

The pipes and reservoirs of a waterworks Company were so placed in the several parishes in which they were respectively situate, that the whole together formed one apparatus for the supply of water, in some only of such parishes, to the customers of the Company; a part of such apparatus being rateable to the poor rate in each parish.

Held, that it was not a correct principle, in order to ascertain the rateable value of the apparatus in any one particular parish, to calculate the total rateable value of the whole apparatus in all the parishes, and then divide that value among the several

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parishes, according to the quantity of land occupied by the apparatus in each of them. *Regina v. Overseers of Putney*, 108.

- ii. Rateable value of canal and adjoining lands. Construction of local Act, (30 G. 3. c. lxxxii. s. 67.)

The Act incorporating appellants, a canal Company, provided that the Company should "from time to time be rated to all parliamentary and parochial rates and assessments for and in respect of the lands and grounds to be purchased or taken by the" "Company," "in pursuance of" the "Act, in the same proportion as other lands lying near the same are or shall be rated, and as the same lands and grounds so to be purchased or taken would be rateable in case the same were the property of individuals in their natural capacity.

In pursuance of the Act, the Company purchased lands and made the canal. At that time the lands adjoining those so purchased were let for use as mere land; but they afterwards greatly increased in value, and, at the time that the rate now appealed against was made, were extensively built over, and worth, if let for the purpose of being built on, 6d. per annum the square yard. The average rateable value, at the time of making the rate, of the nearest land to the canal which was then still used as mere land, was about 3d. per acre per annum. Upon other land adjoining the canal, wharfs, yards and buildings had before then been erected, the average rateable value of which was then 5d. the square yard.

On a case stated for the opinion of this Court by Sessions, on an appeal by the Company against a poor-rate made by respondents, for a parish in which part of the canal was situate, to which appellants were assessed in the same proportion as the lands lying near the canal were rated, as occupied at the time the rate was made: Held, that appellants were not rateable in proportion only to the rateable value of the whole of the lands adjoining the canal, considered as mere land: but that the true principle of their

rateability was that the adjoining land covered with buildings should be brought into hotchpot with the adjoining lands of other descriptions, and that appellants should be rated for the land occupied by the canal according to the aggregate value, at the time of making the rate, of the whole land brought into hotchpot: that value being the rent which a tenant from year to year would give for the whole; in estimating which, regard was to be had to that proportion of the rent paid by the tenant of any building standing on the land, which he might be supposed to pay in respect of its site as enhanced in value, beyond the uncovered land, by being built upon. *Regina v. Glamorganshire Canal Company*, 186.

- iii. Owner of whole house, occupying beneficially, as a subject, not exempt from rateability though he performs duties therein as servant of the Crown, and allows other servants of the Crown, as such, to use it.

Appellant, distributor of stamps at C., rented a house there at 52*l.* 10*s.* per annum. By agreement with the Commissioners of Inland Revenue he let five principal rooms and a closet, in this house, for the use of the surveyor of taxes and of the collector of Inland Revenue for C. By the agreement, possession was to be given and rent to commence at a given time, and appellant was to be paid "the annual consideration of 90*l.*; this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same." One other room in the house was occupied by appellant as an office for vending stamps and transacting other public business connected with his duties as stamp distributor. He employed an assistant in this room, who also took in there for him private orders for printing, which he executed elsewhere. The remainder of the house, consisting of two kitchens and a cellar on the basement, and a sitting room and two bedrooms on the second

floor, was occupied by a man and his wife and daughter, under an agreement by which appellant, besides allowing him to live rent free, paid him 6*l.* 10*s.* yearly and found him with coals and candles; he in return cleaning the rooms and lighting the fires. Appellant exhausted, annually, the whole of the 90*l.* payable to him under the first mentioned agreement, with the exception of 2*l.* 10*s.* in paying his own rent; the expenses of coal, fuel and gas; the wages of the man before mentioned; and other incidental expenses.

On a case stated for this Court, on an appeal by appellant to Sessions against a poor-rate for C. to which he was rated on the full annual rateable value of the whole house: Held, that appellant was properly rated; for that he was the beneficial occupier of the whole house in his capacity as a subject. That the five rooms and closet were not in the separate possession of the revenue officers; and the fact that appellant's benefit, in respect of that part of the house, was derived from payments made to him by servants of the Crown for privileges given to them in that capacity, did not exempt him from rateability: and that the room occupied by appellant himself was not occupied by the Crown through him as its servant. *Smith v. Overseers of St. Michael, Cambridge*, 383.

- iv. Deductions allowable from rateable value of railway line, stations and buildings in a township.

Deductions from rateable value held allowable to a railway Company, upon assessment to poor rate, in respect of the portion of their line passing through, and of the station, buildings and sidings within, a township; on the following principles.

1. That the percentage amount to be allowed the Company for interest on capital and tenant's profits was to be calculated upon the depreciated value of the rolling stock at the time the rate was made, not upon its cost price.
2. The Company being obliged to provide (in addition to the rolling

stock), turntables, cranes, weighing machines, stationary steam engines, lathes, electric telegraph and apparatus, office and station furniture, and gas works used for supplying the stations with gas: Held, that a deduction should be allowed for interest on capital and tenant's profits, in respect of such of these articles as were moveable; for instance, the office and station furniture: but not in respect of such of them as were either so attached to the freehold as to become part of it, or, though capable of being removed, were so far attached as that it was intended that they should remain permanently connected with the railway or the premises used with it, and remain permanent appendages to it, as essential to its working.

3. It being necessary, in order to carry on the business of the railway, that the Company should have in hand, at command, a sum of money by way of floating capital, for providing surplus stores (as rails, sleepers, &c.), to be used in case of accident on the line, or other emergency, and partly for paying the wages of servants of the Company and other current expenses: Held, that the question whether a deduction should be allowed, for interest and tenant's profits, or either, upon this floating capital, must depend on whether, on the whole capital employed, a greater delay occurred in realizing the returns than is ordinarily incident to the employment of capital. That a deduction was allowable in respect of any such delay, but not in respect of a delay in realizing the profits on a part only of the capital, if compensated by the more than ordinary quickness of the return on the rest.

4. That the deduction to be allowed in respect of the stations, buildings and sidings along the line, must be calculated on the actual value at which they ought to be assessed, and not upon the original cost of construction. *Regina v. North Staffordshire Railway Company*, 392.

- v. Rateable value of railway station for use of which the occupying Company receives a higher annual payment

than could be obtained as rent for it from a tenant from year to year.

Appellants, a railway Company, being the sole proprietors and occupiers of a railway station on their line, in 1848 entered into an agreement with another railway Company, by which the latter were, for a certain annual payment, to have for 999 years the joint use of the station for their traffic, appellants continuing to be occupiers of the station, subject to such use. In 1859, the annual value of the station having then from various causes fallen very much below the sum paid annually to appellants, under this agreement, by the other Company, appellants were assessed to a poor-rate in respect of the station, on the full sum so paid to them.

In a case stated for this Court, on an appeal by appellants to Sessions against this rate, on the ground that the rateable value of the station was not the rent actually paid but the rent which could be actually obtained for it from a hypothetical tenant from year to year, it was stated as an admitted fact that appellants were the persons rateable in respect of the whole occupation of the station. Held, that appellants were properly rated on the full amount paid by the other Company; appellants being sole occupiers of the station, subject to an easement by the other Company, and the payment being a profit arising out of appellants' occupation. *Regina v. Fletton*, 450.

2. Recovery of.

Duty of justices to enforce rate by distress warrant, at instance of overseers, successors to those who made the rate. *Stats. 43 Eliz. c. 2. s. 4.*; *17 G. 2. c. 38. s. 11.*

Stat. 43 Eliz. c. 2. s. 4. empowers "as well" "the present as subsequent" "overseers, or any of them," by warrant from two justices, to levy all arrears due for poor-rate, by distress and sale of the offender's goods. *Stat. 17 G. 2. c. 38. s. 11.* enacts that, in case any person shall refuse or

neglect to pay the overseers by whom a poor-rate is made, any sum at which he is legally rated, "the succeeding overseers" may levy such arrears, and out of the money so levied reimburse their predecessors all sums of money expended by them for the use of the poor.

Held, that the latter statute does not restrict the power conferred by the former to overseers immediately succeeding those by whom a poor-rate is made, but that any overseers, subsequent to those making the rate, are still entitled to procure a distress warrant from justices to enforce payment of arrears of the rate by defaulters. *Overseers of East Dean v. Everett*, 574.

II. Under Nuisances Removal Act. *Nuisances Removal Act.*

REMOVAL.

Order of. *Poor*, II.

SADDLERS' COMPANY.

Charter and bye-law of. Disqualification of bankrupt or insolvent for office of Assistant, 42. *Charter*.

SALE.

Of real property, 685. *Vendor and Purchaser*.

SEASHORE.

Between high and low water mark, is part of adjoining county, 234. *Jurisdiction*, II. 2.

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Pleading.

SHIP AND SHIPPING.

I. Ship how proved *British*, 178. *Merchant Shipping Act*, 1854.

II. Construction of contract of shipment between charterer of ship and shipper of goods on board. Liability of such shipper to charterer for demurrage, though contract creates partnership in freight between them.

Plaintiff, having chartered a steamer, agreed with defendants to take out some engines in her to *Barcelona*, it being known to both parties that the engines could not be shipped unless some alterations were made in her hatchways. The agreement contained the following conditions. First: that plaintiff should lay the steamer on her berth at *Liverpool* for *Barcelona*. Secondly: that she should not be required to lie on her berth longer than ten days. Thirdly: that she should make the voyage from there to *Barcelona* for the lump sum of 650*l.*, plaintiff to pay all charges. Fourthly: that defendants should load in the steamer two engines and tenders complete, for 240*l.*, freight to be paid at *Liverpool* on delivery of bills of lading, without any deduction for interest or insurance. Fifthly: that such of the above goods as weighed above 20 cwt. should be put in the steamer, stowed, taken out and landed at shipper's risk and expense. Sixthly: that the said goods should be taken out of the steamer as soon as the captain was ready to deliver them, in five days, *Sunday* excepted; and 20*l.* sterling demurrage to be paid by the shipper or receiver of the said goods, for every day that she was detained over and above five days. Seventhly: that the steamer should be entered in the joint names of plaintiff and defendants, so that the latter might assist to get cargo. Eighthly: that any surplus of freight above 650*l.* should be divided between plaintiff and defendants, and also any loss which might result. Ninthly: that the said steamer should guarantee to carry 480 tons dead weight, besides

40 tons of coal in the bunkers. Tenthly: that the bills of lading for the whole cargo of the said steamer should be signed at the office of plaintiff. Eleventhly: that the steamer should be consigned at *Barcelona* to the friends of defendants, paying 2l. commission on the above freight.

The steamer was put on her berth at *Liverpool*, and, by consent of her owner, the beams in her hatchways were removed, for the stowage of the engines, at the joint expense of plaintiff and defendants. The engines, which exceeded 20 cwt. in weight, were then brought alongside; and it was found, before ten days had expired, that they would not go down the hatchways, notwithstanding the removal of the beams. The consent of the shipowner to the further widening of the hatchways was thereupon obtained, on condition that the ship should, before sailing, be made right to the satisfaction of *Lloyd's* surveyor. In consequence of the necessary delay for widening the hatchways and making the ship thus right, she lay on her berth thirteen days beyond the stipulated ten.

Plaintiff having brought this action, on the second clause of the agreement, for demurrage in respect of the detention by defendants of the ship on her berth beyond ten days: Held, that defendants were liable on that clause, it being collateral to and independent of any partnership in the freight; assuming that the agreement constituted a partnership to some extent between the parties in that respect.

The Judge directed the jury that, by reason of the 5th clause of the agreement, defendants were liable for any detention of the ship necessary to effect such alterations in her as would enable the engines to be put on board by defendants. Held a right direction. *Bleck v. Balleras*, 203.

III. Authority of master to trans-ship, in port of distress, goods which are on board under charterparty: in order that they may be forwarded to destination. Whose agent he is in

making fresh charterparty, at higher rate of freight, with master of substituted ship. Amount of freight payable by consignee of the goods. Transfer of lien for freight from original to substituted shipowner. Extent of such lien. Right of consignee to deduct from freight advances to master of original ship.

Defendants, *London* merchants, by charterparty made between them and C., the master of the ship *Planter*, chartered that ship to bring a cargo of guano from *Callao* to *England*. The ship was, by the charterparty, consigned outwards to defendants' agents in *South America*; and freight at 70s. per ton was made payable on her arrival in *England*, deducting such advances on account of freight as charterers' agents might, as the charterparty empowered them, make to C. in the *Pacific*. The *Planter* arrived at *Callao*, loaded her cargo of guano, and set sail for *England*, defendants' agents having, previously to her sailing, made large advances to C. on account of freight. Soon after sailing she sprang a leak, which compelled her to put back to *Callao*, and she arrived there the second time, consigned to a firm independent of defendants or their agents. It was then found that she could not proceed on her voyage, and C., defendants' agents refusing to interfere, trans-shipped the cargo into another ship, *The Alarm*, to be forwarded to *England*. For this purpose a charterparty was entered into between plaintiff, the master and apparent owner of *The Alarm*, and C. in his own name; under which freight was made payable by the consignees, on ship's arrival in *England*, at 70s. per ton. Plaintiff then made out bills of lading, in which C. was named as shipper and defendants as consignees. At the date of this latter charterparty the current rate of freight at *Callao* was only 40s. per ton, and it was agreed between plaintiff and C. that plaintiff should pay the difference between that and the charterparty freight to C., but whether for C.'s benefit or that of his

owners did not appear. The cargo arrived in *England*, in *The Alarm*; when plaintiff claimed from defendants the full freight of 70s. per ton; from which defendants, on the other hand, insisted on their right to deduct the advances made to C. by their agents at *Callao*. Defendants having paid the freight less the amount of such advances, plaintiff brought this action to recover that amount.

A verdict having been taken, by consent, for plaintiff, for this amount, leave being reserved to defendants to move to enter it for them, the Court to have power to draw inferences of fact from the above facts, which were proved at the trial; Held, making absolute a rule to enter the verdict for defendants: First, that the proper inference from the facts was that C. made the charterparty with *The Alarm* as agent for his owners and not for defendants; the agreement by plaintiff to return him part of the charterparty freight being a legitimate transaction in that view, but a gross fraud on defendants, to which plaintiff was a party, in the other. Secondly, that assuming C. to have made the said charterparty as defendants' ostensible agent, he had no implied authority, from the necessity of the case, on trans-shipping the cargo, to bind defendants to payment of a higher than the current rate of freight; and plaintiff had knowledge of that want of authority. Thirdly, that, apart from *The Alarm* charterparty, plaintiff had no lien on the cargo for a greater amount of freight than the balance due after crediting defendants with the advances to C.: for that assuming (a point which the Court did not decide), that upon a trans-shipment of cargo arising from necessity, in a port of distress, in order to its being forwarded to its destination, the original shipowner can transfer his lien for freight to the substituted shipowner, he can transfer no greater right of lien than he himself possesses. *Matthews v. Gibbs*, 282.

IV. Extent of liability, in respect of

shipment of cargo, of agent for foreign charterer, entering into charterparty which provides for its cessation.

By a charterparty made between plaintiffs, shipowners, and defendants, agents in *England* for foreign charterers, it was agreed that plaintiffs' ship the *B.* should proceed to *J.*, and there load in regular turn, in the customary manner, from defendants, a full and complete cargo of coke. It was further agreed that, as defendant were acting for foreign principals, "all liability of" defendants "in every respect, and as to all matters and things, as well before and during as after the shipping of the said cargo," should "cease as soon as they" had "shipped the cargo."

Defendants having loaded and shipped the agreed cargo, plaintiffs afterwards sued them in this action for not having shipped it in regular turn. Held, that the action would not lie, for that the charterparty limited defendants' liability to the actual shipment of the cargo, and protected them from responsibility for any irregularity or delay in the shipment. *Milvain v. Perez*, 495.

STATUTE.

Construction of.

General words "Any other persons whomsoever," not restricted in meaning by following words which describe particular persons. Liability, in consequence, of all persons to be called upon to give evidence before committee of justices appointed to prepare basis for county rates. Stat. 15 & 16 Vict. c. 81. ss. 2, 5, 7, 8.

Stat. 15 & 16 Vict. c. 81., by sect. 2, empowers the justices of a county to appoint a committee of their body for the purpose of preparing a basis or standard for fair and equal county rates, to be founded on the full and fair annual value (interpreted by sect. 6 to mean the net annual value) of the property rateable to the poor-rate in every parish in the

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county. Sect. 5 empowers this committee to order, in writing, certain specified parish officers and other persons, having the custody or management of any public or parochial rates or valuations of the parishes, to make written returns to the committee of the amount of the full and fair annual value of the property in any parish liable to be assessed toward the county rate; the date of the last valuation for the assessment of such parish; and the name of the surveyor or other person by whom such valuation was made. By sect. 7 the committee may, by their order in writing, require the "overseers of the poor, constables, assessors, collectors, and any other persons whomsoever, to appear before them," "and to produce all parochial and other rates, assessments, valuations, apportionments, and other documents in their custody or power relating to the value of or assessment on all or any of the property within the several parishes" "which may be liable to be assessed toward the county rate, and to be examined on oath" "touching the said rates, assessments, valuations, or apportionments, or the value of property aforesaid." By sect. 8, "every person who shall neglect or refuse to appear when required so to do as aforesaid, or to be sworn or examined, or to produce such documents as hereinbefore provided," is subjected to a penalty not exceeding 20*l.*, recoverable before justices.

Held, that sect. 7 authorizes the committee to call before them all persons whomsoever, able to give evidence of, and produce any documents relating to, the actual annual value of the property to be assessed to the county rate; and does not restrict the committee to ascertaining, by the examination of the persons, and the inspection of the documents, specified in sect. 5, the amount at which the property is rated to the poor-rate. That therefore a person having in his possession private accounts and documents relating to the annual value of collieries and coal mines assessable to the county rate, and able to give evidence touching their net annual value,

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incurs the penalty under sect. 8 by refusing to obey an order of the committee, under sect. 7, for his appearance before them with such accounts and documents. *Regina v. Doubleday*, 501.

STATUTE OF LIMITATIONS.

As to real actions.

Stat. 3 & 4 *W.* 4. c. 27 ss. 2, 7, 15.

Possession of land under conveyance intended, but ineffectual, to pass fee, not adverse. Possession under tenancy at will. Creation and determination of such tenancy.

On 21st *August*, 1781, the lord of a manor, with the consent of certain of the tenants, granted to five persons, two of whom were the churchwardens and overseers of the parish of *M.*, license to enclose 3 a. 2 r. of the waste of the manor; and that they and their heirs, and all persons claiming under them, should and might lawfully hold the same, so enclosed, in trust for the purpose of building a workhouse for the poor of *M.*; rendering to the then lord and to all other lords of the manor the yearly rent of 5*s.* for the same in every year for ever. This grant was not according to any custom in the manor, nor was there any such custom. The churchwardens and overseers of *M.* immediately took possession of the land the subject of the grant, and built on it a workhouse which, up to *Midsummer*, 1838, was used as such; and possession of the workhouse and land was retained by the churchwardens and overseers, or persons claiming through them, from 1781 to 1840, when they were surrendered to the then lord of the manor, as hereafter mentioned. In 1817, the churchwardens and overseers of *M.* also took possession of 2 r. 10 p. of land, contiguous to that granted in 1781; and retained possession of this additional land also from 1817 to 1840. The five persons nominated as trustees of the original land by the grant of 1781 all died before 1817, and no heir of the survivor came in to claim admittance to it, after due proclama-

tions in the manor Court calling upon him to do so. In *October*, 1835, the then steward of the manor gave notice to the churchwardens of *M.* to nominate other trustees in the stead of those deceased, in order to their admittance at the next manor Court, to save a forfeiture. In compliance, the vestry of the parish nominated seven fresh trustees, who, on 27th *October*, 1835, were admitted to both pieces of land at a manor Court; the parish paying a fine to the lord and the lord granting the land to the seven persons and their heirs, to hold by copy of court roll and at the will of the lord, on the same trusts as in the grant of 1781, and at the same yearly rent of 5s. From the accounts of a deceased steward of the manor, it appeared that this rent was paid to the lord from 1781 to 1791, and from the parish books of *M.* it appeared that it was also paid from 1825 to 1836. In *January*, 1840, the vestry of *M.* passed a resolution that, there being no further use for the premises as a workhouse, the land should be forthwith surrendered to the then lord of the manor by the churchwardens and overseers, and the trustees appointed in 1835. And in *February*, 1840, that surrender was made to the then lord of the manor, the surrender comprising, in terms, the first piece of land only, but possession being given to the lord, not of it only, but also of the other. The lord, by himself or by persons claiming under him, held undisturbed possession of both pieces of land from *February*, 1840, to the time of the present action.

On a case stated, in an action of ejectment brought, on 16th *February*, 1859, by the churchwardens and overseers of *M.*, to recover both pieces of land from defendants, who were in possession and claimed under the lord of the manor of 1840, power being reserved to the Court to draw inferences of fact: Held, that plaintiffs were not entitled to recover either piece of land. As to the original piece, that the possession by plaintiffs under the grant of 1781 was at the outset permissive, and had not, down to and at the time of the passing of

stat. 3 & 4 *W. 4. c. 27.* (*July*, 1833), become adverse; plaintiffs having, from 1781 down to that time, held either as tenants at will or, at most, as tenants from year to year of the lord. That such tenancy was determined by the admittance of the fresh trustees for *M.* in *October*, 1835, whereby, within five years from the passing of stat. 3 & 4 *W. 4. c. 27.*, a fresh tenancy at will was created: which last tenancy was, within twenty-one years of its inception, namely, in 1840, determined by the lord's entry and resumption of possession. As to the piece of land taken possession of by plaintiffs in 1817: That the lord's right of entry to it could not be barred before 1837, before which, namely, in 1835, it was included in the land to which the fresh trustees were admitted; as it was, in 1840, in the land of which the lord retook possession. *Hodgson v. Hooper*, 149.

STATUTES.

I. GENERAL PUBLIC.

- 43 *Elis. c. 2. s. 4.* (Poor), 574. *Rate*, I. 2.
- 4 *Jac. 1. c. 3. s. 2.* (Costs), 358. *Costs*, I.
- 11 *G. 2. c. 19. s. 1.* (Landlord and Tenant), 614. *Landlord and Tenant*, 2.
- 17 *G. 2. c. 38. s. 11.* (Poor), 574. *Rate*, I. 2.
- 30 *G. 2. c. 21. s. 5.* (*Thames Fishery*), 588. *Thames Conservancy Act*, 1857.
- 3 *G. 4. c. 126.* (General Turnpike), 233, 358. *Turnpike*.
- 4 *G. 4. c. 34. s. 3.* (Masters and Servants), 549. *Master and Servant*, I.
- 6 *G. 4. c. 57. s. 2.* (Settlement of Poor), 437, 555. *Poor*, I. 1. i. ii.
- 6 *G. 4. c. 129. s. 3.* (Combination of Workmen), 516. *Master and Servant*, II.
- 9 *G. 4. c. 61. s. 21.* (Innkeepers' Licensing), 1. *Gaming*.

- 10 G. 4. c. 56. s. 27. (Friendly Societies), 623. *Friendly Societies Acts*.
- 1 W. 4. c. 18. s. 1. (Settlement of Poor), 555. *Poor*, I. 1. ii.
- 1 & 2 W. 4. c. 32. s. 4. (Game), 444. *Game Act*.
- 1 & 2 W. 4. c. 38. s. 16. (Church Building), 640. *Church Building and Parishes Formation Acts*.
- 3 & 4 W. 4. c. 27. (Limitation of Real Actions), 149. *Statute of Limitations*.
- 4 & 5 W. 4. c. 76. (Poor), 257, 555. *Poor*, I. 1. ii. II. 2.
- 5 & 6 W. 4. c. 63. ss. 21, 28. (Weights and Measures), 568. *Weights and Measures Act*.
- 5 & 6 W. 4. c. 76. (Municipal Corporations), 222. *Municipal Corporations Reform Acts*, I.
- 7 W. 4 & 1 Vict. c. 78. (Municipal Corporations), 634. *Municipal Corporations Reform Acts*, II.
- 6 & 7 Vict. c. 37. (Parishes Formation), 640. *Church Building and Parishes Formation Acts*.
- 8 Vict. c. 20. (Railways Clauses, 1845), sects. 103, 104; 672. *Company*, II. 3.
- 8 & 9 Vict. c. 118. (Inclosure), 7. *Inclosure Acts*.
- 9 & 10 Vict. c. 66. (Orders of Removal), 224. *Poor*, I. 2.
- 11 & 12 Vict. c. 43. (Justices of the Peace), 257. *Poor*, II. 2.
- 11 & 12 Vict. c. 111. (Orders of Removal), 224. *Poor*, I. 2.
- 12 & 13 Vict. c. 45. s. 6. (Quarter Sessions Procedure), 561. *Poor*, II. 3.
- 12 & 13 Vict. c. 106. (Bankrupt Law Consolidation), 578. *Bankrupt and Insolvent*.
- 15 & 16 Vict. c. 57. s. 8. (Corrupt Practices at Elections), 658. *Evidence*, I. 1. ii.
- 15 & 16 Vict. c. 79. s. 13. (Inclosure), 7. *Inclosure Acts*.
- 15 & 16 Vict. c. 81. ss. 2, 5, 7, 8. (County Rate), 501. *Statute*.
- 16 & 17 Vict. c. 97. (Pauper Lunatics), 224. *Poor*, I. 2.
- 17 & 18 Vict. c. 36. (Bills of Sale Registration), 428, 610. *Bills of Sale Registration Act*.
- 17 & 18 Vict. c. 104. ss. 19, 107, 257. (Merchant Shipping), 178. *Merchant Shipping Act*, 1854.
- 17 & 18 Vict. c. 125. s. 58. (Common Law Procedure), 467. *Common Law Procedure Act*, 1854.
- 18 & 19 Vict. c. 63. (Friendly Societies), 623. *Friendly Societies Acts*.
- 18 & 19 Vict. c. 120. ss. 158, 159. (Metropolis Local Management), 89. *Metropolis Local Management Act*.
- 18 & 19 Vict. c. 121. (Nuisances Removal), 271, 277. *Nuisances Removal Act (England)*, 1855.
- 19 & 20 Vict. c. 104. (Parishes Formation), 640. *Church Building and Parishes Formation Acts*.
- 20 Vict. c. 13. (Mutiny, 1857), 338. *Habeas Corpus*, II.
- 21 & 22 Vict. c. 90. (Medical), 525. *Medical Act*.
- II. LOCAL AND PERSONAL, PUBLIC.
- 16 G. 3. c. xxviii. (*Stourbridge Canal*), 409. *Canal*, II.
- 30 G. 3. c. lxxxii. (*Glamorganshire Canal*), 186. *Rate*, I. 1. ii.
- 7 & 8 G. 4. c. clxxv. (Watermen's and Lightermen's), 244. *Watermen's and Lightermen's Acts*.
- 11 G. 4. c. lxx. (*Hungerford Market Company*), 365. *Toll*, II.
- 6 & 7 W. 4. c. cxxxiii. (*Hungerford Bridge Company*), 366. *Toll*, II.

20 & 21 *Vict. c. cxlvii.* (*Thames Conservancy*). 538. *Thames Conservancy Act*, 1857.

22 & 23 *Vict. c. cxxxiii.* (*Watermen's and Lightermen's Amendment*, 1859), 244. *Watermen's and Lightermen's Acts*.

SUGGESTION.

On record, as to change of venue in quo warranto, 147. *Venue*.

SUNSTROKE.

Death by, not death by accident, within life policy against accidents, 478. *Insurance*.

TENANT.

Landlord and Tenant.

THAMES CONSERVANCY ACT, 1857.

(20 & 21 *Vict. c. cxlvii.*)

Sects. 52, 76. Power of Conservators of *Thames* to appoint assistant river keepers, with authority to enter fishing boats and seize brood of fish, under stat. 30 *G. 2 c. 21. s. 5*. Penalty incurred by obstructing such keepers.

Stat. 30 *G. 2. c. 21. s. 5*. enacts that, for the better preservation of the fishery of the river *Thames*, within the jurisdiction of the mayor of *London*, as conservator of the river, it shall be lawful "for the deputy of the said mayor for the time being, as conservator as aforesaid, commonly called the water bailiff, and his assistant or assistants," appointed by warrant under the hand and seal of the mayor, to enter the boat of any fisherman or other person fishing on the *Thames*, and seize all brood of fish found there. Sect. 6 imposes a penalty of 10*l.* on any person "who shall obstruct or hinder the said water bailiff" or "his assistants," "in the execution of any of the powers vested in them by this Act;" and sect. 11 gives a convicted person

TOLL.

a right of appeal to the next Court of Conservancy.

The *Thames Conservancy Act*, 1857, 20 & 21 *Vict. c. cxlvii.*, creates a new corporation, called "The conservators of the river *Thames*," and, by sect. 52, transfers to them "all the powers, authorities, rights and privileges," "which might be exercised by the mayor of *London*," "by prescription, usage, charter, or Act of Parliament, or otherwise, with regard or relation to the conservancy and the preservation and regulation of the river *Thames*," save only so far as the same may be modified by, or be inconsistent with, the provisions of that Act. Sect. 76 imposes a penalty, not exceeding 5*l.*, on any person who "shall resist or make forcible opposition against any person employed in the due execution of this Act."

Held that, under the latter Act, although it does not apparently have the fishery of the *Thames* in contemplation, the conservators of the *Thames* are empowered to appoint, under their hands and seals, assistant river-keepers, with express authority to enter fishing boats and seize brood of fish, in pursuance of stat. 30 *G. 2. c. 21. s. 5*; and that a person obstructing such an assistant river-keeper in so doing, is not liable to the penalty imposed by sect. 6 of that statute; but is liable to the penalty imposed by stat. 20 & 21 *Vict. c. cxlvii. s. 76. Turnidge v. Shaw*, 588.

TOLL.

I. Turnpike.

1. Exemption from, of fodder for cattle, 238. *Turnpike*, I.
2. Ejectment by mortgagee of. Costs on plaintiff's nonsuit, 358. *Costs*, I.

II. Right of Company empowered by statute to take toll in return for a public service, to remit toll in whole or in part. Stats. 11 *G. 4. c. lxx s. 76*; 6 & 7 *W. 4. c. cxxxiii. ss. 53, 125*. Right of Market Company to landing tolls for use of pier adjoining market.

A Company empowered by statute

to take tolls in return for a public service is not bound, independently of express enactment, to exact the same tolls from all persons alike; but is at liberty to remit the tolls, or any portion of them, to particular persons, at its pleasure and discretion.

Stat. 11 G. 4. c. lxx., by which plaintiffs, a market Company, were incorporated, by sect. 76 empowered them to take from the master of any steamboat "in respect of every passenger landing on or embarking from the wharf or causeway" authorized by the Act to be made, "the" "tolls" "which" should "at any time or from time to time be fixed and appointed by" plaintiffs, not exceeding 2d. for each passenger. A subsequent Act, 6 & 7 W. 4. c. cxxxiii., incorporating another Company for the purpose of building a bridge from plaintiffs' market over the *Thames*, by sect. 53 authorized plaintiffs to levy the same tolls for passengers landing on or embarking from the northern pier of the intended bridge which stat. 11 G. 4. c. lxx. s. 76. had empowered them to levy. And by sect. 125 it was enacted, that "the tolls to be taken by virtue of" the "Act should at all times be charged equally," and that every "reduction or advance of" them should "extend to all persons whatever using the said bridge."

Plaintiffs, after the bridge had been built, fixed and appointed the toll to be received "under the 76th clause of" their "Act of incorporation, from the master of every steamboat" "in respect of every passenger landing on or embarking from" the northern pier, at 2d. But by agreement with defendants, a steamboat Company, they charged defendants a toll of 1s. 4d. per 100 of their passengers; and, by agreement with another steamboat Company, charged that Company a lower toll of 1d. per dozen of their passengers. Passengers landing on or embarking from the northern pier from or on to steamboats used no other portion of the bridge than the northern pier, which abutted on plaintiffs' land.

Plaintiffs having brought this action to recover from defendants ar-

rears of toll for passengers at the rate agreed upon with defendants: held, that plaintiffs were entitled to recover the full amount. That stat. 11 G. 4. c. lxx. s. 76. was not an equality clause, requiring plaintiffs to charge the fixed and appointed toll in full for each passenger; but that it directed the toll to be fixed and appointed merely in order that the public might know the maximum toll they could be called upon to pay; leaving plaintiffs' right to lower or remit the toll, if it otherwise existed, wholly untouched. That in the absence of an equality clause in that Act such right did exist, and was not abrogated by stat. 6 & 7 W. 4. c. cxxxiii. s. 125., that enactment applying only to tolls taken by the bridge Company for the use of the bridge, and not to the tolls taken by plaintiffs. *Hungerford Market Company v. City Steamboat Company*, 365.

TRADE MARK.

Action for fraudulently causing plaintiff unknowingly to counterfeit a third person's trade mark; when sustainable. Damages. Costs of Chancery suit brought by the third person against, and compromised by, plaintiff, recoverable.

Declaration, for that, plaintiff having agreed with defendant to make for and sell to him bricks, to be marked as defendant might direct, defendant wrongfully, deceitfully and injuriously directed plaintiff to mark them with the name of *R.*; defendant then well knowing, and plaintiff not knowing, as the fact was, that *R.* used that name as a mark on bricks made and sold by him, to distinguish them from bricks made and sold by other persons; and that plaintiff, by so marking the bricks to be made for defendant, would become liable to legal proceedings for damages at the suit of *R.*, and to be restrained by injunction from making any more of such bricks. That plaintiff, in ignorance of the consequences, and of *R.*'s rights, marked the bricks as directed by defendant, and delivered them to him. That *R.* thereupon filed a bill

in Chancery against plaintiff for an injunction, an account of the profits made by plaintiff from the bricks, and a decree that plaintiff should pay the amount thereof to R. That plaintiff thereupon compromised such suit by paying R. a large sum of money for his damages, costs and expenses, and was also compelled to pay large sums of money for the costs of his own necessary defence to the suit.

Demurrer. Joinder in demurrer.

Held, that the declaration disclosed a good cause of action, on the ground that plaintiff, though innocent of fraud in counterfeiting R.'s mark, was nevertheless liable in equity to the suit for having in fact counterfeited it: and semble also on the ground that, the natural consequence of defendant's act being to plunge plaintiff into the Chancery suit, and thereby to cause him to incur costs and expenses, plaintiff, whether or not he was liable to the suit, had a good cause of action against defendant to recover the damages so sustained. *Dixon v. Fawcus*, 537.

TRANSHIPMENT.

Of goods, in port of distress, 282.
Ship and Shipping, III.

TRUSTEES.

Effect of sale of property by, at inadequate price, 685. *Vendor and Purchaser*.

TURNPIKE.

- I. General Turnpike Act, 3 G. 4. c. 126. s. 32. Exemption of fodder for cattle from turnpike toll.

The General Turnpike Act, 3 G. 4. c. 126., enacts, by sect. 32, "that no toll shall be demanded or taken" "on any turnpike road, for" "any horse, beast or other cattle or carriage employed in carrying or conveying, having been employed only in carrying or conveying on the same day," "any hay, straw, fodder for cattle, and corn in the straw, which has grown or arisen on land or ground in the occupation of the owner of any such hay,

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straw, fodder or corn in the straw, potatoes or other agricultural produce, and which has not been bought, sold or disposed of, nor is going to be sold or disposed of."

A horse and cart passed through a toll-gate, carrying threshed barley, which had grown on land in the occupation of the owner, to a mill to be ground into meal for feeding the owner's pigs. They repassed on the same day laden with barley-meal obtained from the mill, the produce of another parcel of barley grown by the same owner on the same land, and previously sent to be ground into meal for the same purpose. The horse and cart had not been employed in any other way on the same day. Held, that they were exempt from toll under the above enactment on each journey: for that both the barley and the barley-meal came within the description of "fodder for cattle." *Clements v. Smith*, 238.

- II. Ejectment by mortgagee of turnpike tolls. Costs on plaintiff's nonsuit, 358. *Costs*, I.

USAGE.

Of trade. Parol evidence to explain term of art in written contract, 306.
Evidence, I. 3.

VALUER.

Under Inclosure Acts. Proceedings by, before justices, to recover possession of encroachment, 7. *Inclosure Acts*.

VENDOR AND PURCHASER.

Right of purchaser of realty to rescind contract, and recover deposit, where vendor is devisee of survivor of several donees of a power of sale given to them "or the survivor of them, or the heirs, executors, or administrators of such survivor." Effect of omission of "assigns" in description of donees of power. Court of law, how far bound to decide on validity of vendor's title. Right to rescind on ground of

former sale to vendor at inadequate price, by trustees.

S., being seised in fee of a messuage and having other real and personal estate, died, having devised all his real and the residue of his personal estate to W. S. and H. S., "their heirs, executors and administrators," upon trust that W. S. and H. S., or the survivor of them, or the heirs, executors, or administrators of such survivor, should sell. The testator further declared that W. S. and H. S., or the survivor of them, or the executors or administrators of such survivor, should hold the proceeds of the sale in trust to pay debts and invest all the residue of the trust moneys in government or real securities, and pay the dividends equally between the testator's wife and daughter during their lives, and wholly to the survivor after the decease of one of them; and, after the decease of that survivor, to divide the whole equally amongst all the then living children of the testator, or, failing them, according to the Statute of Distributions. The testator also appointed W. S. and H. S. his executors. They acted in the trust, and H. S., the survivor, devised all his real and personal trust estates to A. and B. (whom he also appointed his executors), to hold to them, their heirs, executors, administrators and assigns, upon the same trusts as the testator H. S. held them. After the death of H. S., A. and B. sold the messuage in question to C., who subsequently contracted with plaintiff to sell it to him in fee.

In an action by plaintiff to recover the deposit money paid under this contract, on the ground that C. had failed to make out a good title, held (dubitante Blackburn J.) that plaintiff was entitled to recover; inasmuch as, by reason of the omission of "assigns" in the description of the donees of the power of sale in the devise by S. creating the trust, the title of the devisees of H. S. to convey to C. was too doubtful for a Court of equity to compel specific performance of the contract.

Quære, per Blackburn J., whether

this Court, as a Court of law, was not bound to decide absolutely whether the vendor's title was good or bad.

S. in 1810 bought the messuage in fee for 462*l*. The price paid to A. and B. by C., upon the sale of it to him in 1855, was only 73*l*. 4*s*., and the contract price between C. and plaintiff, in 1859, was 350*l*.

Held, per totam Curiam, that the inadequacy of the price at which A. and B. sold constituted a breach of trust; and that, as plaintiff, having notice, was affected thereby, plaintiff was entitled on that ground to refuse to complete the contract. *Stevens v. Austen*, 685.

VENUE.

Power of Court to change, in quo warranto. Ground for change.

The Court has power to change the venue in an information in the nature of a quo warranto: and a suggestion on the record, that the trial of the issue can be more conveniently had in the county of the substituted venue, shews sufficient ground for the change, and for the subsequent proceedings in that county. *Clark v. Regina*, 147.

WATERMEN'S AND LIGHTER-MEN'S ACTS.

7 & 8 G. 4. c. clxxv. ss. 37, 101; 22 & 23 Vict. c. cxxxiii. ss. 7, 54. Penalty when incurred by unqualified person navigating barge for hire on *Thames*. Western barges.

The Watermen's and Lightermen's Amendment Act, 1859, 22 & 23 Vict. c. cxxxiii., by sect. 54 subjects to a penalty "any person, not being a freeman licensed in pursuance of" the "Act, or an apprentice, qualified according to" the "Act, to a freeman or to the widow of a freeman of the" Watermen's Company, who "shall at any time act as a waterman or lighterman, or ply or work or navigate any" "lighter" "upon the" "river" *Thames* "from or to any place or places" "within the limits of" the "Act, for hire or gain."

Stat. 7 & 8 G. 4. c. clxxv., which by sect. 37 imposed a similar penalty,

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and by sect. 101 exempted therefrom persons navigating "western barges," is repealed by stat. 22 & 23 *Vict. c. cxxxiii.*, which by sect. 7 enacts "that such repeal shall not affect" "any appointment or license duly made or granted under any enactment hereby repealed."

Held, that a person found plying and navigating a barge for hire on the *Thames*, within the limits of stat. 22 & 23 *Vict. c. cxxxiii.*, and not being licensed or qualified according to the Act, incurs a penalty under sect. 54, though the barge started from a place beyond those limits, and would, under stat. 7 & 8 *G. 4. c. lxxv.*, have been deemed a "western barge." *Doick v. Phelps*, 244.

WATERWORKS COMPANY.

Rateability to poor-rate of apparatus of,
108. *Rate*, I. 1. i.

WEIGHTS AND MEASURES ACT.

(5 & 6 *W. 4. c. 63.*)

Sects. 21, 28. What are "measures" liable to seizure and forfeiture.

Earthenware jugs or drinking cups, ordinarily used as imperial measures by a publican in his business, are,

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although not stamped as measures, and exempted by stat. 5 & 6 *W. 4. c. 63. s. 21.* from being so stamped, nevertheless "measures" within the meaning of sect. 28 of that Act, which empowers any authorized inspector of weights and measures to enter any shop or place within his jurisdiction, in which goods are exposed and kept for sale, and there to examine all measures, and to compare and try them with the copies of the imperial standard measures required by the Act to be provided: and renders measures, found on such examination to be unjust, liable to be seized and forfeited; and the person in whose possession they are found to be convicted in a penalty. *Regina v. Aulton*, 568.

WESLEYAN MINISTER.

Settlement of, 555. *Poor*, I. 1. ii.

WORDS.

I. "Any other person whomsoever" in a statute, following words of description of particular persons. Construction, 501. *Statute*.

II. "Assigns." Effect of omission of, in description of donees of power of sale, 685. *Vendor and Purchaser*.

THE END.









